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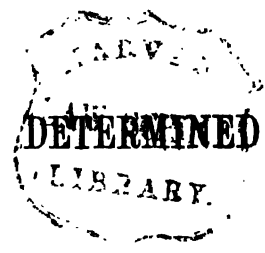
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Vol. 23

11 D 21 VERMONT SUPREME COURT 33
REPORTS C7

OF
CASES ARGUED AND DETERMINED
IN



THE SUPREME COURT

OF THE

STATE OF VERMONT,

BY
CHARLES L. WILLIAMS.

VOL. II.

10/11
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1857

RUTLAND:
PUBLISHED BY GEO. A. TUTTLE & CO.
1857.

Entered according to act of congress, in the year 1867, by
CHARLES L. WILLIAMS,
in the clerk's office of the district court for the district of Vermont.

Rev. Mar. 7 1860

JUDGES
OF THE
SUPREME COURT
DURING THE TIME OF THESE REPORTS.

HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }



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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

FOR THE

COUNTY OF WASHINGTON,

AT THE

NOVEMBER TERM, 1855;

AND AT THE

CIRCUIT SESSION IN SEPTEMBER, 1856.

PRESENT,

HON. ISAAC F. REDFIELD, CHIEF JUDGE.

HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.

HON. MILO L. BENNETT, }

JOSEPH G. GRAY v. S. G. STEVENS AND A. REDWAY.

Landlord and tenant. Trespass. Damages.

The lessor of a farm, who stipulates in his lease that the crops shall be consumed on the place and remain his property until certain conditions are performed, may, if a portion of the crops are sold by the lessee, and removed from the farm in violation of the stipulation, sustain an action of trespass against the lessee and the purchaser who removed them.

Gray v. Stevens et al.

The purchaser, though he acts innocently, and in ignorance of the lessor's rights, will be equally liable with the lessee. The lessee stands in no such relation that he can convey any greater right to the property than he himself possesses.

The rule of damages in such case is the value of the property removed.

TRESPASS for taking a quantity of hay and straw. Plea, the general issue; trial by jury, March Term, 1855,—POLAND, J., presiding.

The plaintiff's evidence tended to prove that in April, 1852, he leased his farm to the defendant Stevens until the first day of April, 1853, for which Stevens was to pay \$140, rent. The plaintiff was to put on and did put on to said farm six cows; and all the hay and straw raised on the farm was to be foddered out thereon, and was all to be and remain the property of the plaintiff until the end of the term, and until all the conditions of the contract were performed by Stevens. Stevens was to put on cattle enough, with those of the plaintiff, to consume all the fodder as near as they could calculate, and if there was any surplus left, of one and a half or two tons, the plaintiff was to have it, provided he would pay as much as anybody else. Stevens entered into possession under this lease. In November the rent for the farm was fully paid; and about the 25th of December, Stevens then being on the farm, and the plaintiff's six cows there also, all the hay and straw on the farm was attached, as Stevens' property. Stevens continued to feed out the hay to the stock till about the 16th of February, when all of said hay and straw was sold at public auction by a legal officer, as the property of Stevens, except the hay and straw now in controversy, which was reserved by the officer, as the debtor's exemption under the statute. The plaintiff's evidence also tended to prove that Stevens, soon after the auction sale, sold all the hay and straw, so reserved to him, to the defendant Redway, and received his pay therefor; and that about a week after the sale said hay and straw was removed by Redway, and that he was assisted by Stevens in making the removal; and that Redway knew of the plaintiff's interest in the hay at the time of making his purchase.

The evidence on the part of the defendants, tended to show that by the terms of the letting, it was agreed between them that all the hay and fodder raised by Stevens on the farm should be fed

Gray v. Stevens et al.

out thereon, but that there was no agreement that the same should be the property of the plaintiff until said contract should be fulfilled by Stevens, as the plaintiff claimed. The evidence of the defendants also tended to prove that at the sheriff's sale the hay was bid off, partly by Redway, and partly by one Mallory, and that the plaintiff bid off a quantity of straw which was sold by the sheriff; that the defendant Stevens sold the hay and straw that was reserved to him by the officer not to Redway but to Mallory, and that Mallory exchanged with Redway and took the hay Redway had bid off and let Redway have that he had purchased of Stevens. The hay and straw, which had been sold by the sheriff, had not been removed by the purchasers, but was in the plaintiff's barn when the hay in controversy was removed, and there was enough of it to have kept out the plaintiff's cows. The defendant's evidence also tended to show that Redway had no knowledge of any claim on the hay and straw, except such as Stevens admitted, that is, his agreement that the same should be fed out on the place.

It was conceded that this suit was commenced in the night after the hay and straw was removed, and it was admitted that Stevens had properly fed and cared for the plaintiff's cows up to that time.

The defendant's counsel requested the court to charge the jury that trespass could not be sustained against either defendant, as Stevens was a co-tenant, or at least a bailee with a beneficial interest, and there had been no destruction of the property, as Stevens had a right to the possession and control of the hay and straw and to feed it to his own stock. Second, that Stevens, from his relation to the property, had such a right that *bona fide* purchasers from him would be protected.

But the court declined to charge as requested, and did charge, among other matters not objected to, that if the jury found the contract to be as the defendants claimed, a mere agreement by Stevens that the hay and fodder was to be fed out on the place, then the plaintiff could not recover; but that if they found that by the contract between them, all the hay and straw was to be and remain the property of the plaintiff, until Stevens should fully perform his part of the agreement, then the plaintiff was entitled to recover the value of the said hay and straw.

Verdict for the plaintiff. Exceptions by the defendant.

Gray v. Stevens et al.

Merrill & Willard for the defendants.

J. A. Wing for the plaintiff.

The opinion of the court was delivered by

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REDFIELD, CH. J. The leading question in this case, *i. e.* whether the action of trespass will lie, seems to us expressly decided in the late cases of *Briggs v. Oaks*, *same v. Bostwick*, 26 Vt. 138 and *same v. Bennett* 26 Vt. 146. These cases were extensively discussed at the bar; and the opinions contain all the argument which I could now offer, and which it is not important to repeat here. The case of *Farrant v. Thompson*, 5 Barn. & Ald. 826, had been adopted by this court in *Swift, v. Mosely* 10 Vt. 208, where it was decided, that if the tenant of personal property, sold the same during the term, he thus determined his tenancy and forfeited all right in the property; and the general owner might sue either the tenant who sold the property or the purchaser, in trover, and by parity of reason, in trespass. But in the late cases referred to, we decided that the lessor of a farm who stipulates, either expressly or by reasonable implication, to have the general property in the crops, and that they should be consumed upon the farm, or if the same stipulation was made in regard to other property put on the farm, or raised there, as that it should be kept there during the term, and the tenant, in violation of such stipulations, sold the same and suffered the property to be removed from the farm, all his right and interest therein was determined, and the lessor might recover for it, in trespass, against all consenting to, or aiding in the removal. The same general principles are held in *Smith v. Atkins*, 18 Vt., 461. We also substantially adopted the principles of the case of *Lewis v. Lyman*, 22 Pick. 437, in the case of *Briggs v. Oaks*. The difference between the foregoing cases, and that of *Hurd v. Darling*, 14 Vt; S. C., 16 Vt., arises altogether from the difference in the contracts in the cases, and the construction the court gave to them. That the contract in the case of *Hurd v. Darling*, was fairly susceptible of the same construction we give the present contract, or which we gave the contract in *Smith v. Atkins*, is undoubtedly true; but the contracts were very far from identical, and altogether susceptible of the different construction put upon them. But it is certain the later cases incline

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very strongly to the rule which we here adopt, and it is undoubtedly the safer and surer rule, both for landlord and tenant.

II. It is certain that the defendant Redway could derive no more right from Stevens than Stevens had, however innocently he might have acted. Stevens stood in no such relation to the plaintiff, as would enable him to convey more title than he himself possessed, which was only to have the hay fed out upon the farm.

III. The rule of damages was fair enough, as it seems to us. The plaintiff had a right to have all the hay fed out upon the farm, or as nearly as the stock could be calculated in proportion to fodder, leaving all doubts in favor of having less stock than fodder, and the small residue of the hay the plaintiff had the right to purchase upon certain terms. Under this state of the contract, the plaintiff was not bound to adopt a different rule of settling the transaction, nor, when defendant had suffered a large quantity of hay to be sold upon execution against him, was plaintiff bound first to sue the sheriff and recover what he could of him. He might sue any one, and every one, who intermeddled with the hay, contrary to the terms of the lease, and the plaintiff's rights under it.

The case seems to have been correctly tried, and the judgment is affirmed.

ELEAZER D. WRISLEY AND CHARLES WRISLEY v. RUFUS KENYON.

Infant. Appearance.

A justice judgment against a minor is valid, and cannot be set aside on account of his infancy, if his father and natural guardian was sued jointly with him, and appeared and defended the suit.

AUDITA QUERELA to set aside a judgment recovered before a justice of the peace, in favor of the defendant against the complainants, on the ground that the complainant Charles Wrisley was

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a minor, and appeared only by attorney, and had no guardian *ad litem* appointed to appear and defend for him. Plea, the general issue; trial by the court, March Term, 1855,—POLAND, J., presiding.

Certified copies of the record of the justice were introduced, from which it appeared that the suit was for a trespass committed by the complainants jointly, and it was admitted that, at the time of the rendition of the judgment, Charles Wrisley was a minor, and that the other defendant in that suit, Eleazer D. Wrisley, was his father and natural guardian. Both of the complainants attended the trial and were witnesses, and each one of them took an active part in the preparation and management of the defense of the suit. Luther Henry appeared as counsel, and conducted the defense as attorney for both, but he testified that he was employed by Charles. Nothing was said about Charles being a minor, and no guardian was appointed by the justice to defend for him. Upon these facts the county court rendered judgment for the defendant, to which the complainants excepted.

L. Henry for the complainants.

P. Dillingham for the defendant.

The opinion of the court was delivered by

ISHAM, J. This writ of audita querela is brought to vacate a judgment which was rendered against the complainants in favor of Mr. Kenyon. The ground of complaint is, that Charles Wrisley, one of the defendants in that suit, was an infant, that he appeared by attorney, and that no guardian *ad litem* was appointed by the court. It appears from the case, however, as well as from the record of the justice, that Eleazer D. Wrisley was the father and natural guardian of the minor, that the suit was prosecuted to judgment against them both, that they appeared at the trial, and that the father took upon himself the defense of the suit. As a general rule infants must defend by guardian. They cannot appoint an attorney, and therefore cannot appear by one. Co. Litt. 135, b. note 220. *Comstock v. Carr*, 6 Wend. 526. In cases, therefore, when the infant is sued alone, or jointly with others, it is incumbent on the plaintiff to see that the rights of the infant are

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protected by a guardian. For that purpose the court, on the application of the plaintiff, will appoint a guardian *ad litem*, as that power is incident to every court; or the plaintiff in the first instance may notify the father of the minor of the pendency of the suit, and if he appears and makes defense the judgment will be conclusive. If notice has been given to the father and natural guardian, no guardian *ad litem* need be appointed by the court, and if an infant sues, or is sued, and his natural guardian is a party, as such, to the proceedings, no other admission by the court is necessary, 1 Swift's Dig. 60; *Archer v. Frowde*, 1 Stg. 304. If an infant has no natural guardian, notice to his general guardian appointed by the orphan's court will be sufficient, *Mercer v. Watson*, 1 Watts, 330. In the case of *Robinson v. Swift*, 3 Vt. 283, it was held that an infant was bound by a decree of the probate court, in the distribution of an estate, where his guardian was notified and defended. In such cases no guardian need be appointed by the court. In this case the father was jointly sued with the minor. He, therefore, had notice of the pendency of the suit against the minor, and he appeared and took upon himself the defense of the suit. His appearance and defense in that suit was an appearance for the infant, as well as for himself. That the father, as the natural guardian of the infant, is the proper person to be notified, that he may appear and defend, and that a judgment against the minor, under such circumstances, will be conclusive and binding, was decided in the case of *Priest v. Hamilton*, 2 Tyler 50. The doctrine of that case is approved in 1 Amer. Lead Cas. 265, and is in accordance with the practice in this state from its earliest period.

The judgment of the county court must be affirmed.

Kimball v. School District.

CHARLES W. KIMBALL v. SCHOOL DISTRICT NO. 8, IN
ROXBURY.

School district vote.

The plaintiff built a school house for the defendants, under the employment, upon a *quantum meruit*, of one member only of their building committee, who, it was claimed, could not act without the concurrence of his associate, and that the committee could not bind the district to an amount exceeding \$100.00. The school house was worth \$300.00; and, after its completion, the defendants voted to accept it, and voted to pay the plaintiff \$105.00 therefor. *Held*, that the acceptance was absolute, and amounted to a ratification of the proceedings of the committeeman, and bound the defendants to pay the plaintiff what the school house was worth.

BOOK ACCOUNT. The plaintiff's account was for labor and expenditures in building a school house for the defendants, in reference to which the auditor reported the following facts.

In April, 1851, the defendants voted, "to build a school house the present year," "to raise one hundred cents on the dollar of the list," "chose Samuel Richardson and Alvin L. Brigham a committee to superintend the building of said house," and voted "to leave the plan of the house to the building committee." Such a tax, as the grand list of the district then was, would raise about one hundred dollars. The building committee made application to several house builders for propositions, and Richardson had conversation with the plaintiff in reference to building the house, and informed his associate, Brigham, that he was inclined to contract with the plaintiff; Brigham disagreed, and informed Richardson that, if such was the case, he should not act further in the premises. Richardson told the plaintiff that he knew what the vote of the district was,—that he did not feel authorized to pledge more than the amount of tax, that the plaintiff, being present at the time of the vote heard the conversation,—that the district wanted a good house, and would pay what it was worth, and to go on and build a *good house*. The plaintiff put up the frame, and then told Richardson that a school house, upon the plan submitted, could not be built for the tax voted, but would cost very much more; and that if he expected that the plaintiff was to build it for that sum, he should not do it. Richardson then told the plaintiff to suspend the building until the next season, and then go on and build a good house, so that no fault could be found with it, and the district would probably pay him what it was worth.

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The plaintiff built the school house agreeably to the plan submitted to him by Richardson,—built it well, and had the same completed late in the fall of 1852; but the delay was occasioned by the direction of Richardson.

In the spring of 1853, the district voted to accept the school house, and voted to pay the plaintiff *one hundred and five dollars* for building the same. The plaintiff declined to receive that sum in full payment. The auditor found that the house was worth \$200.00, and allowed the plaintiff that sum, and interest. The county court, March Term, 1855,—POLAND, J., presiding,—rendered judgment for the plaintiff, for the amount reported. Exceptions by the defendants.

H. Carpenter for the defendants.

It was not in the power of one of the committee to bind the district, and if Richardson contracted with the plaintiff to build the house, or to pay an additional sum from that voted, he is liable to the plaintiff, and not the district. *Morrison v. Heath*, 11 Vt., 610. Angell and Ames on Corporations, pp. 279–280, and cases there cited. 12 Mass., 185.

F. V. Randall for the plaintiff.

The direction of Richardson to build a good house at any rate, and that the district would pay what it was worth, clearly shows that no definite sum was fixed on as the price.

Brigham having declined to act at all in the capacity of building committee, Richardson had authority to proceed alone and build the house, and the district directly recognized this authority, by voting to accept the house.

The opinion of the court was delivered by

BENNETT, J. The school district voted to build a school house, and to raise a tax of one hundred cents on the dollar, which would produce only about the sum of one hundred dollars. The plan of the house was to be left to the building committee, Richardson and Brigham. Though it be granted that one of the committee had no power to bind the school district by a contract which he might make without the concurrence of the other, yet the school district

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might ratify the proceedings of one of the committee. But the house was not, in fact, built under any special contract with Richardson; he told the plaintiff to go on and build a good house, so that no fault could be found with it, and that the district would probably pay him what would be right. This was, in fact, an employment upon a *quantum meruit*. The plaintiff built a good house, according to the plan furnished him by Richardson; and when finished, the district voted to accept it, and to pay the plaintiff one hundred and five dollars for building the same. The acceptance of the house is *absolute*, and not upon condition that the plaintiff would accept of one hundred and five dollars as a compensation. The vote is *to accept*, and *to pay*, &c., and in its nature is divisible. The limitation, as to the sum they would pay, has no effect upon the *acceptance*. It is found that it was worth two hundred dollars to build the house.

Let judgment below be affirmed.

LEVI COLBY JR. v. LEVI COLBY.

Construction of deed.

A father deeded to his son, as a compensation for his services, a piece of land, with a condition in the deed that the grantor was to have the use and improvement of the premises during his life, if he should have occasion therefor, and should choose to use them. *Held*, that the grantor retained a life estate in the premises which was extinguishable only by deed; and which, after a voluntary surrender of the possession of the premises to his son, but without any writing, he could again avail himself of, whenever he chose.

THE nature of the action originally brought, does not appear in any of the papers furnished to the reporter. The case was referred, and the referees reported the following facts.

THE plaintiff became of age March 14, 1824, and soon thereafter agreed to go to work for his father, the defendant, and take his pay in land. No time was specified and no price was agreed upon. The plaintiff labored for the defendant till 1836, when, having

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intimated his desire for some security for his services, the defendant executed and lodged in the town clerk's office in Berlin, a deed to the plaintiff of one hundred acres of defendant's farm, and gave notice thereof to the plaintiff. The deed was a deed of warranty in common form, with a proviso therein in the following words: "provided, nevertheless, and it is the express condition of this deed, that I am to have the use and improvement of the premises during my life, if I have occasion therefor, and shall choose to do so." No settlement was made by the parties, and no valuation was fixed to the land so conveyed. In 1840 the defendant sold out that portion of his farm upon which he lived, erected a house, barn, and out-buildings upon the land which he had deeded to the plaintiff, and commenced living thereon. The plaintiff continued to labor for the defendant and assist in carrying on the farm, without any other contract than the arrangement entered into in 1824, and without any settlement in relation to the same, until 1847, when the defendant told the plaintiff, that he, the defendant, had become too aged to carry on the farm, and that he, the plaintiff, must take it and carry it on; and thereupon the defendant yielded up the control and management of the farm, together with all the stock, hay, grain, provisions, wood &c., to the plaintiff, who has had the sole control, management and use of the same ever since. The land and such portion of the personal property as were liable to taxation were set in the plaintiff's list in the spring of 1847, and such has been the case with all the taxable property on the farm ever since. The defendant and his wife, (the father and mother of the plaintiff) continued to reside in the family, and were supported by the plaintiff, they doing such light work and chores as their age and infirmities admitted, and as they chose to do, until May, 1854, when, some difficulty having arisen in the family, the defendant left and claimed a settlement with the plaintiff. The referees further reported, that if the court were of opinion from the facts found and detailed as above, that the defendant had not surrendered his life estate in the land deeded by him to the plaintiff in 1836, and had still a right of re-entry thereon, they found due to the plaintiff from the defendant, to settle all matters in controversy between them, the sum of five hundred and twenty-three dollars; but that if the court should be of opinion from the foregoing facts,

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that the defendant had surrendered his life estate in said premises, and had no right to resume the possession and use of the same, they then found due from the defendant to the plaintiff, to settle all matters in controversy between them, the sum of two hundred and three dollars. Upon this report the county court, March Term, 1855,—POLAND, J., presiding,—rendered judgment for the plaintiff to recover the largest sum reported.

Exceptions by both parties.

Merrill & Willard for the plaintiff.

We claim one of three constructions for this deed. 1. An estate which depended upon the election of the defendant, without any provision that the *election* should be expressed in writing. 2. A life estate which might determine upon the contingency of the defendant's choice or election, or, 3. An estate at the will of the defendant, which could be determined or surrendered without a deed. Cruise vol. 1, p. 259.

If it was either of these we submit that the defendant had no longer any estate under the deed.

1. The referees find that he has made his election—held the estate as long as he chose, and given it up. He is estopped now from making another election to the prejudice of the plaintiff, who has made investment upon the faith of the surrender.

2. If the second construction is taken, the contingency has happened, and the estate is determined by its terms.

3. If it be treated as an estate at will, it has been surrendered, and cannot be resumed.

Heaton & Reed for the defendant.

I. The effect of the deed of Levi Colby to his son, is to give the father a life estate, and the son a fee after this estate for life. 4 Kent 25; 2 Bacon's Abr. 559; 1 Cruise 105-6; *Gorham v. Daniels*, 23 Vt. 600; and to divest this estate of the father, a surrender or its equivalent is required. 4. Cruise 92 § 1 and 2.

II. The defendant intended no surrender of his estate by what transpired in April, 1847. There was no such contract between the parties, and no consideration for any. This transaction has no reference to the deed. It was not alluded to or thought of.

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III. A surrender, as well as any other divestment of title, to be valid, must be in writing. Comp. Stat. 389 § 1, 387 § 24. 4 Kent 103-92. 4 Cruise 93, § 5 and 6.

The opinion of the court was delivered by

REDFIELD, CH. J. The only question made in the present case is in regard to the estate which remained in the defendant after his deed to the plaintiff of the one hundred acres. We think it must be regarded as a life estate, which he could use at any time when he chose, and that the right to use it was intended to continue through life, as a security for his maintenance. This is the only reasonable construction to be put upon the terms of the deed, when viewed in connection with the purpose of the conveyance, and the situation of the parties.

The surrender of the control of the farm, and the stock, and the business, is certainly not sufficient to extinguish the defendant's right in the land. That could only be done by deed, executed in the form prescribed in the statute. The statute in terms extends to the surrender of an estate, which in strictness only applies to a life estate, or some lesser estate, conveyed to him who is the owner of the fee in reversion.

But the referees have not found that it was the defendant's intention to surrender and extinguish his life estate, and we are satisfied that what transpired is quite consistent, perhaps more consistent with the purpose of retaining than surrendering it. It is, indeed, one of the cases which shows the wisdom of requiring the conveyance of land, to be by a solemn and formal instrument.

Judgment affirmed.

Marshall v. Town.

WILLIAM MARSHALL v. ALBERT TOWN.

Sale of property upon mesne process. Attachment. Possession.

Property attached may be sold upon mesne process, in pursuance of the statute, (Comp. Stat. ch. 81 § 81) before the service of the writ is completed, by the delivery of a copy of it to the defendant.

A sale upon mesne process, of a part only of the property attached, but for an amount exceeding the plaintiff's claim, and exceeding the amount to which the officer is commanded to attach, will not dissolve the attachment as to the remainder, or impair the creditor's lien upon it.

Property sold, which is in the possession of a third person, is subject to attachment as the property of the vendor, until the vendee gives notice of his ownership.

If property is attached and removed to the building of a third person by his permission, but with an understanding that he is to assume no responsibility as to its custody or safe keeping, the attaching officer is to be regarded as the person having the possession of the property, and any notice, in reference to a change in the ownership of it, should be given to him, and not to the owner of the building.

TROVER for a quantity of corn which the plaintiff's testimony tended to show was sold to him by William P. Briggs, on the 7th of December, 1852, at which time the plaintiff took a lease of the said Briggs' real estate in Richmond. The written lease which was executed by them, contained a transfer of the corn in question, and of some other personal property, for all which, the plaintiff's testimony tended to show, he was to pay 500 dollars to one Thomas Reed, to whom Briggs was indebted. The corn had been attached with other property on the 7th day of the preceeding October, upon a writ in favor of A. B. Maynard against said Briggs; and afterwards on the 11th of October and the 1st of November upon writs against Briggs, in favor of Wires & Peck, and of Whipple & Jones. These attachments were made by leaving copies at the town clerk's office; but about the 30th of October, 1852, the attaching officer removed the corn from the premises of Briggs to the corn-barn of the defendant, by his permission; but the defendant, when giving the permission, told the officer he would not assume any responsibility whatever, of its custody, or for its safe keeping, to which the officer replied that he required none. The attachments in favor of Wires & Peck, and of Whipple & Jones, were released on the 8th of December, 1852, and on the 9th of December, 1852, the corn sued for,

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was attached by the same officer upon a writ in favor of J. & J. H. Peck & Co., against Briggs; and it was admitted that said writ had been duly returned to, and was pending in Chittenden county court, and that the said Pecks & Co. were creditors of Briggs. It appeared from the files and records in the suit *Maynard v. Briggs*, that the attaching officer on the 13th of December, 1852, sold upon the writ, upon the previous application of the plaintiff, and in pursuance of the statute, a part of the property attached in that suit, not including this corn, for the sum of \$ 341,48, exclusive of the expense of the sale; and that this amount exceeded Maynard's claim, and the amount to which the officer was commanded to attach in his writ; and that a judgment was regularly obtained, and an execution issued, in favor of Maynard, on the 17th of May, 1853, which was the first day upon which he was entitled to it. It also appeared that the service of the writ upon Briggs was not completed, by delivering a copy of it to him until the 7th of February, after the sale; but this was more than twelve days before the session of the court at which it was made returnable. It was claimed by the plaintiff that, for this reason, the sale of the property was void, and the officer a trespasser; also that the sale of property attached to an amount equal to that which the officer was commanded in the writ to attach, operated as a discharge or dissolution of the attachment, as to the remaining property not sold; but the court instructed the jury, that if the proceedings were in other respects regular, the sale would not be invalid on account of the copy of the writ not having been given to the defendant Briggs at the time of the sale; and that the sale of a part of the property would not have the effect of releasing the remainder, but that the officer would still have the right of holding it until a final judgment was rendered in the suit; and to these instructions the plaintiff excepted.

Evidence was introduced by the plaintiff, tending to prove that on the 8th of December, 1852, he notified the defendant that he had purchased the corn; but this was denied by the defendant, whose testimony tended to prove that no notice was given to him until some weeks after the attachment of the Pecks. The court charged the jury, that it was necessary for the plaintiff to have given notice to the defendant, that he had become the owner of the

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corn ; and that if no notice was given until after it was attached on the writ of the Pecks, that attachment would hold against the plaintiff's title ; and to this charge the plaintiff also excepted.

Evidence was given tending to prove that the corn in question was not originally attached on the writ, in favor of Maynard, but no question of law was reserved on this part of the case ; and it was claimed on the part of the defendant, that the alledged sale from Briggs to the plaintiff, was fictitious and fraudulent. The jury returned a verdict for the defendant.

W. P. Briggs for the plaintiff.

Peck & Harvey for the defendant.

The opinion of the court was delivered by

ISHAM, J. The plaintiff claims title to the corn, for which this action is brought, under a contract of sale contained in a lease of certain premises to himself given by Mr. Briggs on the 7th of December, 1852, for which, the plaintiff was to pay Mr. Reed, to whom Mr. Briggs was then indebted, the sum of five hundred dollars. It appears from the case, that at the time of that sale, this corn, with other personal property, had been attached as the property of Mr. Briggs at the suit of Mr. Maynard, of Messrs. Wires & Peck, and of Whipple & Jones, and that those attachments were then subsisting liens on the property. Mr. Briggs, therefore, at the time of that sale, had a general property in this corn, which passed to the plaintiff under that sale ; but a special property existed in the officer by whom the attachment was made, with the right also of its exclusive possession. So long as that right of the officer exists, it is obvious that the plaintiff cannot sustain this action. The suits of Messrs. Wires & Peck, and Whipple & Jones, were settled on the 8th of December, 1852, leaving only the attachment of Mr. Maynard as a lien on the property. The attachment in that case was made on the 7th of October, 1852, and a copy of that attachment was duly left in the town clerk's office. A judgment was recovered, and an execution issued on the 17th of May, 1853, which was the first day that it could lawfully issue. It is insisted that the lien created by that

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attachment was dissolved; and that the officer had no right, on the strength of it, to retain the property from the possession of the plaintiff. From the records in that case it appears that, on an application duly made for that purpose under the statute, the officer sold on the writ personal property, other than the corn in question, to the amount of \$341.48, being more than the amount of the plaintiff's claim, and more than the amount for which he was commanded to attach; and that this sale was made before a copy of the writ was delivered to Mr. Briggs. We are satisfied that the neglect of the officer to deliver to Mr. Briggs a copy of the writ, will not affect the legality of that sale. The requirement of the statute in that respect is complied with if the copy is left twelve days before the session of the court to which the writ is returnable. The object of that provision is to notify the defendant of the pendency of the suit, the cause of action upon which the plaintiff has declared, and the term of the court in which his appearance is to be entered. The Comp. Stat. 245, providing for the sale of personal property on *mesne process*, is a distinct and independent provision. Except in the particulars above mentioned, it was not pretended, at the argument of the case, that there was any irregularity in that sale. We are not called upon to express an opinion upon the question, whether the officer was, in all respects, justified in making a sale of that property to that amount, as, in any event, we think, it will not have the effect to dissolve the attachment upon any of the property which was included in the officers return. The sale changed the form of the security, but preserved the lien. If, in that proceeding, the officer abused the process in his hands, its effect will be, not to destroy the lien of the creditor, but to subject the officer to a liability in an action on the case for such damages as the party injured has actually sustained. In the case of *Pierson v. Gale*, 8 Vt. 512, the court remarked, that "it is well settled, that whenever the process is regular, and issues from a court of competent jurisdiction, neither the officer or party are liable in trespass, for any mere abuse of the process, however groundless or malicious their proceedings may be; but the appropriate remedy is case." The doctrine of that case is fully sustained by both English and American authorities. *Luddington v. Peck*, 2 Conn. 700. *Watson v. Watson*, 9 Conn. 148. *Brown v.*

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Foster, 7 Wend. 301. *Belk v. Broadbent* 3 Term. 185. Chitty on Plea. 187, 136.

But if that sale was illegal, and if the attachment was dissolved by it, the difficulty in sustaining this action is not removed. The attachment of Pecks & Co., was placed on this corn, as the property of Mr. Briggs, on the 9th day of December, 1852, the second day after the sale by Mr. Briggs to the plaintiff, and long before the sale of the personal property on mesne process. That suit, it appears, is still pending in Chittenden county; and also that they are in fact the creditors of Mr. Briggs. If a lien on that property has been created by that attachment, and if that property was then subject to be taken as the property of Mr. Briggs, it is obvious, that this action cannot be sustained, for the officer has still a special property in the corn, and a subsisting right to its exclusive possession. The sale of the property, by Mr. Briggs, passed a valid title to the plaintiff as against himself, but not as to his creditors. If the property had remained in the possession of Mr. Briggs, a visible and substantial change of its possession would have been necessary to protect it from being attached as his property; but as the property was in the hands of a third person, notice of the sale, and of his right to the property, was necessary to have been given by the plaintiff to the officer having its custody and possession. Such notice would be equivalent to a change of possession. *Barney v. Brown*, 2 Vt. 374. *Potter v. Washburn*, 13 Vt. 558. On this subject the court charged the jury, that it was necessary for the plaintiff to give notice to the defendant that he had become the owner of the property, and that if no notice was given until after the attachment of Pecks & Co., that attachment would hold the property as against the plaintiff. The jury returned a verdict for the defendant, thus in effect finding that no such notice was given before that attachment was made. There was no other issue involved in the case, upon which that verdict could have been rendered, but the fact, that the sale from Mr. Briggs to the plaintiff was fraudulent in fact; and that, with greater certainty, would subject the property to be taken as the property of Mr. Briggs. There has been no point of time, therefore, from the day when this property was first attached, on the 7th of October, 1852, to the present time, in which the officer has not had not only the right of property but the right of possession to this corn as against the plaintiff.

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But if notice had been given to the defendant, we think, the difficulties are not removed so as to enable the plaintiff to sustain this action. It is distinctly stated in the case, that about the 30th of November, 1852, the officer who made the attachment, removed the corn from the premises of Mr. Briggs, and placed it in the corn-barn of the defendant. On that occasion the defendant informed the officer that he would not assume any responsibility whatever of *its custody*, or for *its safe keeping*; and that the officer then informed him that he asked for no such assurances. Under those circumstances, it cannot be said that the defendant stood as the bailee of the officer, or even as his servant. It may be said with greater propriety, that the officer still had the custody of this property; and for that purpose also, by the license and permission of the owner, the possession of the building in which it was placed. The notice of the sale of this property, for the purpose of effecting a change of its possession, and placing it in a situation in which it could not be taken as the property of Mr. Briggs, should have been given, not to the defendant, but to the officer having its custody and possession. For the want of such notice, there was no change of its possession, either actual or constructive, and the property remained subject to be attached as the property of Mr. Briggs. In every point of view, therefore, in which we have been able to look at this case, we are unable to see any ground, on which this action can be sustained.

The judgment of the county court must be affirmed.

THAYER & WILLIAMS v. DANIEL KELLEY, JR.; SMITH, ELDRIDGE & LEE, *Trustees*; HODGES & ROBINSON, *Claimants*.

Assignment of future earnings for future advances.

A person in the actual employment of another, from whom he is receiving wages at a stipulated rate, may make a valid assignment of his future earnings; although the employment is for no definite period, and may be terminated at any time by either party.

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Such an assignment may be made for the purpose of obtaining future advances as well as to secure a present indebtedness.

TRUSTEE PROCESS. The plaintiff's writ was served on the 28th of September, 1854. The persons summoned as trustees were the trustees of the holders of the first mortgage bonds of the Vermont Central Railroad Company, and the principal defendant had for two years previous to that time labored for them at a given price per day, but without any agreement as to time, they having the right to discharge him, and he the right to leave at any time. The trustees were then owing him seventy-five dollars, and he still continued in their employment, and at the time of disclosing, they were owing him one hundred and twenty-one dollars.

In February, 1854, the principal defendant executed and delivered to the claimants a written assignment, of which the following is a copy.

"In consideration of one dollar paid, to my full satisfaction, by "Hodges & Robinson, of Northfield, Vt., and also of my previous "indebtedness to them, and to secure them therefor, and also for "any general balance of account, I hereby assign and transfer to "them or their order, all that is now due me, and what may be for "the space of twelve months due me from the trustees of the first "mortgage bonds of the Vermont Central Railroad Company, or "the corporation thereof, on account of services for either, and I "hereby order the same paid to the said Hodges & Robinson, "without further direction, and their receipt shall and is hereby "made a full discharge of and for the same. Northfield, February "10, 1854."

On the 17th of June, 1854, the principal defendant was indebted to the claimants in the sum of \$86.71, for which he gave them his note, and he subsequently received advances from them which amounted, including the note, at the time of the service of the trustee process, to \$196.56. The trustees had notice of the assignment on the day of its date, and in pursuance of it made payments to the claimants, on account of their indebtedness to the principal defendant; but no copy of the assignment was recorded in the county clerk's office.

Upon the foregoing facts, the county court, March Term, 1855,—POLAND, J., presiding,—adjudged that the trustees were charge-

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able, and that the claimants were not entitled to the funds, &c. Exceptions by the claimants.

F. V. Randall, for the plaintiffs, cited 10 Vt. 251; 23 Vt. 531; 15 Vt. 252; 21 Vt. 426; 7 Met. 335; 1 Gray 105; Laws of 1852, p. 14.

H. Carpenter, for the claimants, cited 23 Vt. 546; 4 Cush. 214; 7 Met. 335; 2 Met. 335; 3 Met. 297; 10 Mass. 319; 12 Mass. 206; 8 Cush. 151; 18 Vt. 277.

The opinion of the court was delivered by

ISHAM, J. It is admitted that the trustees were indebted to the principal debtor, in the sum of seventy-five dollars, at the time of the service of this writ, and in a larger sum at the time of their disclosure. But it is insisted that they are not chargeable, as trustees, in this case, as the debt had been assigned to the claimants before the service of this process, of which the trustees had notice, and in pursuance of which they had made several payments.

The assignment of this claim was made on the 10th of February, 1854. It is not expressly stated that there was an indebtedness, from the principal debtor to the claimants, at the time that assignment was made. But the assignment purports to have been made to secure them on a previous indebtedness, as well as for subsequent advances. The inference is not unreasonable, that the note of \$86.71, which was given by the debtor to the claimants on the 17th of June, 1854, was for an indebtedness, in part at least, at that time; but if not, the effect will be the same, if it was made to obtain future advances. Neither does it appear that there was an indebtedness, at the time of the assignment, from the trustees to the principal debtor. There is nothing stated in the case showing that such an indebtedness existed. The case must be considered, therefore, as if there was no existing claim due from the trustees to the debtor at that time. The question then arises, whether that assignment gave to the claimants such a right to the money as it fell due from the trustees to the principal debtor, for his subsequent earnings, as will enable them to hold it, against an attachment by this trustee process. In the case of *Mahill v. Quinn and trustees*,

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1 Gray 105, it was held that an assignment could not be made of future earnings, "*when they constituted a mere possibility coupled with no interest.*" Such a state of things, it was held, existed, when the person making the assignment was under no subsisting engagement under which wages were to be earned, and when it depended altogether upon a future engagement whether anything would ever become due. But when the debtor is in the actual employment of another, and is receiving wages under a subsisting engagement, an assignment by him of his future earnings may be made, not only for the security and payment of a present indebtedness, but for such advances as he may find it necessary to obtain. This principle is fully established by the cases to which we were referred. *Weed v. Jewett*, 2 Met. 608; *Brackett v. Blake*, 7 Met. 335; *Emery v. Lawrence*, 8 Cush. 151; 2 Selden 187.

The debtor in this case, at the time of his assignment to the claimants, was in the actual employment of the trustees, under a subsisting contract, at a given price per day, and had in that manner labored for them for some two or three years previous;—and though he had the right to leave their employment, and they had the right to discharge him, yet so long as that relation existed between them, we think, the authorities are satisfactory in holding that the claimants were entitled to receive, under that assignment, his accruing wages, in payment of the advances which they had made.

The judgment of the county court must be reversed, and the trustees discharged.

ELHANAN W. CRAM v. GEORGE WATSON.

Sale.

A person contracting to purchase a good article will, if he accept one which is depreciated, with knowledge of its condition, but without objecting to it on that account, be holden to pay the price originally stipulated.

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BOOK ACCOUNT. The auditor reported that on the 30th day of January, 1854, at Concord, N. H., the plaintiff contracted with the defendant to sell him one thousand bushels, or more, of potatoes, delivered in Boston, in good order and well sorted, at seventy cents per bushel, to be delivered on or before the first day of April then next, to be paid for by the defendant as fast as delivered; that on the 28th day of February following, the plaintiff delivered, on said contract, $672\frac{1}{2}$ bushels, 195 of which were unassorted, and many were more or less frozen; that the parties agreed that the frozen and small ones should be drawn out, and the good ones thereby ascertained, and it subsequently turned out that $157\frac{1}{2}$ bushels of the $672\frac{1}{2}$ were frozen, or too small for market, leaving 515 bushels to be accounted for, at seventy cents per bushel, amounting to \$360.50, and that the plaintiff sold defendant a lot of straw, boards, &c., at \$3.00, making the plaintiff's whole account \$363.50, toward which the defendant had paid at different times, \$347.50, leaving a balance of \$16.00, which he allowed, with interest on the same to September, 1853, making \$17.44; that it was proved that no more potatoes were freighted to Boston by the plaintiff, until about the 10th or 12th of the following April, and those the plaintiff sold to another party; and that it was also proved that the sound potatoes were damaged for sale 10 cents in the bushel, by having had the frozen ones among them, but that he made no allowance for such damage.

Upon this report the county court, September Term, 1855,—POLAND, J., presiding,—rendered judgment for the plaintiff for the amount reported by the auditor.

Exceptions by the defendant.

————— for the defendant.

P. Dillingham for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. We understand the report of the auditor to find, that the potatoes allowed were accepted upon the contract, and if so, the defendant is bound by such acceptance, however much they were really depreciated, as it was not by any latent defect, but by being mixed with the others, which was well

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known at the time of the acceptance, and no objection seems to have been made on that account. If not, the defendant is bound by the acceptance, and must pay for them at the stipulated price, as no damages were shown by the entire contract not being fully performed.

Judgment affirmed.

THE TREMONT BANK v. THE ESTATE OF CHARLES PAINE.

Effect of an allowance of a negotiable note against the estate of the payor upon an action against the endorser.

The mere allowance of a promissory note as a valid claim against the estate of its deceased payor, is no defense to an action upon it against an endorser. Nor will an order of the probate court for the payment of a dividend upon the note and other claims allowed against the payor's estate operate, before an actual payment, as a satisfaction *pro tanto*.

In this case the note was allowed against the estate of the payor, in the name of "Andrew T. Hall, President of the Tremont Bank." Held, that the allowance in his name was no defense to a proceeding against the endorser, in the name of the Tremont Bank.

APPEAL from commissioners. Declaration in assumpsit against the testator as endorser of a promissory note given by S. F. Belknap. Plea, the general issue; trial by the court, September Term, 1855,—POLAND, J., presiding.

The plaintiff read in evidence the note declared on; and the signatures of all the parties thereto, the due presentment, protest for non-payment, and notice were admitted; and the following facts were also admitted.

S. F. Belknap, the maker of the note, died in July, 1849, and administration was duly granted on his estate in this state, and also in Massachusetts; and commissioners were duly appointed in both states. The note was presented against Belknap's estate, in Massachusetts, and there allowed by the commissioners, in the

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name of "Andrew T. Hall, President of the Tremont Bank." It was not presented against Belknap's estate in Vermont.

In Massachusetts a dividend of twenty-six and one-half cents on the dollar had been declared and ordered to be paid to the creditors who had proved their claims there; and notice thereof was given to the said Hall, but the same had not been paid. After this claim had been thus allowed, the testator, Paine, died, July 6, 1853, and commissioners were appointed on his estate; and this claim was presented and disallowed, and the plaintiff appealed.

The defendant claimed that upon these facts no recovery could be had in the name of the plaintiffs, and that at least the amount of the dividend declared in Massachusetts should be deducted; but the court rendered judgment for the full amount of the note, deducting endorsements. Exceptions by the defendant.

H. Carpenter for the defendant.

The liability of the endorser follows that of the principal, and cannot be separated from it, and after an allowance of the claim against Belknap's estate, in the name of Andrew T. Hall, it cannot be allowed against the endorser in the name of another plaintiff. It is unlike the case of two joint and several promisors. *Hackett v. Kendall*, 23 Vt., 278. The case of *Sawyer v. White, et ux.*, 19 Vt., 40, is not applicable.

Peck & Colby for the plaintiffs.

The exceptions show that the note was allowed against the estate of Belknap, in the name of "Andrew T. Hall, President of the Tremont Bank," and that is, in effect, in favor of the bank. The defendant shows no cause for questioning the plaintiffs' title to sue, as no person has title to the note, except the plaintiffs. *Hackett v. Kendall*, 23 Vt., 278; *Sawyer v. White*, 19 Vt., 40.

The opinion of the court was delivered by

BENNETT, J. We think the judgment of the county court should be affirmed. A judgment against the maker of a note, unsatisfied, is no defense to an action against an endorser of the same note,—and an allowance of a note against the estate of the maker, cannot have a greater effect. If the dividend ordered to be paid

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by the court of probate, by the administrator on Belknap's estate, had been paid, it would have reduced the damages as against the endorser; but the order to pay is no satisfaction *pro tanto*.

We think the fact that the note was allowed against the estate of Belknap, in the name of "Andrew T. Hall, President of the Tremont Bank," is no defense to this claim against Paine's estate. If the legal title to that judgment is in Hall, he holds it evidently, in trust, for the benefit of the bank. In this state it has been held that a promise made to A. B., Cashier of a particular bank, naming the bank, is, in law, a promise to the bank. The case of *Hackett v. Kendall*, 23 Vt., 278, more than meets this case in principle. If this claim is paid by the estate of Paine, to the Tremont Bank, it will be in no danger of a suit by the president of the bank; and if the demand, as allowed against the estate of Belknap, had been paid to A. T. Hall, president of the Tremont Bank, it would have been a bar to the present claim.

Judgment affirmed.

NATHANIEL SHERMAN, *Administrator*, v. THE ESTATE OF
EBENEZER DODGE, *Apl.*

Assets. Statute of uses. Construction of deed.

The administrator of an insolvent estate is not bound to inventory and account for lands, the legal title to which was in the intestate, at the time of his decease, but the equitable title in another.

A covenant to stand seized to the use of a third person, which would be executed under the statute of Henry VIII., were that statute in force here, will be enforced by a court of equity.

The intestate, for the expressed consideration of \$1,000, executed and delivered to his son, a warranty deed of certain real and personal property, with the condition that the grantor and his wife should have the use and possession of the property during their lives, the grantee to have possession at their decease and not until then. *Held*, that this was a grant of the intestate's whole estate, upon a condition subsequent that the grantee should permit the grantor and his wife to use and enjoy the property during their lives, the performance of which a court of equity would enforce.

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Held, also—that if a life estate were regarded as excepted from the conveyance, and as remaining in the grantor, the deed would be good as an agreement to convey the use for the benefit of the wife after the grantor's death, or, as a covenant to stand seized of the premises to her use, either of which would be enforced by a court of equity.

In either case, the life estate secured, or intended to be secured to the widow, should not, after the death of the grantor, be treated as a part of his estate, except for the payment of debts existing at the time of the conveyance.

A person's choses in action would be included in a conveyance of all his personal property of every name or nature.

APPEAL by the heirs of the estate of Ebenezer Dodge from a decree of the probate court, allowing the administration account of the appellee. The appellants claimed that the administrator should be charged with either the value, or the use of certain property owned by the intestate, July 2d, 1849, which he, on that day, conveyed to his son Alexander P. Dodge, by a deed containing the usual covenants of warranty, for the expressed consideration of one thousand dollars, under the following description, and with the following condition, viz: "all the land and real estate I now own in the town of Marshfield aforesaid, more or less, reference to all deeds on record for a more perfect description of the premises. I also convey, as aforesaid, all my personal property of every name or nature to the said A. P. Dodge, with this condition, to wit: that I Ebenezer Dodge, and my wife Mary Dodge, shall have the use and possession of said real estate and personal property during our natural lives. The said A. P. Dodge to have possession of said premises and personal property at our decease, and not until then." Alexander P. Dodge, the grantee, and Mary Dodge, the person named in the deed, were left by the intestate at his decease, in possession of all the real and personal property mentioned in the deed, and have retained possession ever since, claiming it, in their own right, under the deed. The administrator, having paid all the debts which were allowed against the estate, out of said property, made no attempt to control the residue, being advised that the said Alexander and Mary were the absolute owners of it, by virtue of said deed. The property so conveyed was inventoried as a part of the intestate's estate, and the administrator charged himself with it, in his account, at its appraised value, and credited himself with the balance not used for paying the

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debts, as belonging to the said Alexander and Mary, and therefore wrongly inventoried, and this credit, though objected to by the heirs, was allowed by the probate court. The heirs claimed that the administrator should be charged with several promissory notes, held by the intestate, at the time of his conveyance to Alexander, and which subsequently passed into the hands of the said Alexander and Mary, but the probate court did not so order.

Upon the foregoing facts the county court, September Term, 1855,—POLAND, J., presiding,—decided, *pro forma*, that the decision and order of the probate court appealed from be affirmed with costs to the appellee. Exceptions by the appellants.

J. A. Wing for the appellants.

E. Dodge died seized of an estate in the farm during the life of his wife, of which the widow is entitled to dower, and the remainder descends to the heirs during the life of the widow, and the administrator should be made chargeable with the use of the same. *Gorham v. Daniels, et al.*, 23 Vt. 600. *Adams v. Dunklee*, 19 Vt. 382. *Hornbeck v. Westbrook*, 9 Johns. 74. *More v. Earl of Plymouth*, 3 B. & Ald. 66.

In this case the wife is a stranger to the deed; no consideration moved from her, and she is in no way affected by the deed. There was no resulting trust to her created by the deed, and as the statute of uses is not in force in this state, she took nothing under the deed from her husband to A. P. Dodge.

The contract between E. Dodge and his son was simply this: A. P. Dodge was to have the farm after the death of E. Dodge and his wife, and not until then; and on the death of E. Dodge, the wife would be entitled to dower in the premises, and the heirs to the balance until the death of the widow.

A deed of land, to take effect at the end of a life, is valid in this state.

It was an estate that E. Dodge could have sold and conveyed, or discharged without the consent of his wife, and his conveyance would have conveyed the whole estate.

The administrator should be charged with the notes and accounts; they were choses in action, and not personal property within the meaning of the deed.

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Merrill & Willard for the appellee.

Deeds should be so construed as to operate according to the intention of the parties, if by law they may. *Broom's Legal Maxims*, 273.

The intent of the parties in the case at bar, is beyond question. It was to create an estate for life to the husband *and* wife, and survivor of them. Can this be effectuated without unsettling fixed rules of construction. It can in New York, 20 Johns. 85. It can in Connecticut, 16 Conn. (cited in Smith's Lead. Cas. 292.) 1 Day's Dig. 266. Similar deeds have been held to convey an estate in Massachusetts, 4 Mass. 135; 7 do. 381. The reasoning of *Adams v. Dunklee*, 19 Vt. 382, as the court have applied it in *Gorham v. Daniels*, 23 Vt. 600, is in point in support of this construction. See also 16 Vt. 309.

What objection is there to this construction? It is not a reservation, in strictness of definition; nor an exception; and it should not be rendered inoperative by reason of technical objections.

But if it be treated as a reservation, it should still give a life estate to the wife; for the reason that a reservation cannot be made to a stranger, is because upon a bargain and sale, no legal estate could be limited to a *third person*; in other words, a use could not be executed upon a use, under the statute of uses. That statute not being in force in this state, (23 Vt. 600) the reasoning does not apply.

The case of *Gorham v. Daniels*, is not an authority against this view of the case, for in that deed no disposition was made of the intermediate estate. In this case the *use and possession* are expressly reserved to the grantor and his wife. The court in *Gorham v. Daniels* say that in this state there is no *need* to resort to the statute of uses, to give effect to the *intent* of parties to deeds. Will they say at the same time that the case in which resort is had to this statute, in other states, to carry out the *intent* is without remedy? This would be singular and manifest injustice.

The opinion of the court was delivered by

REDFIELD, CH. J. The principal question in this case is, whether the plaintiff was bound to treat the estate, real and per-

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sonal, which was conveyed to A. P. Dodge, as a part of the estate of Ebenezer Dodge. It is certain there is a very considerable similarity in the deed in this case, and the one which came under consideration in *Gorham v. Daniels*, 23 Vt. 600. But the deeds are not by any means identical. It is not uncommon for instruments, quite as similar as these, to receive different interpretations by the same court. Here the conveyance is, in the most general and unlimited terms, of the whole estate, with what is called, in the deed, a condition; and a condition subsequent, as this is, is something to be performed by the grantee, and if it is not performed, the conveyance is thereby defeated, and becomes inoperative. In the present case, the spirit of the condition is, that the grantee shall suffer the grantor to enjoy the premises during his life, and if his wife survives him, then suffer her to enjoy the use during her life. And although these are not uses which can be executed under the statute of Henry VIII., that not being in force here, (*Gorham v. Daniels*.) yet a court of equity will execute them, as is said in that case, and so, clearly, the property is not to be treated as a part of the estate of the intestate, any farther than debts are concerned, which existed at the time of the conveyance.

But if we give this deed precisely the same construction which we did that in *Gorham v. Daniels*, and regard the life estate as an exception from the conveyance, and remaining in the grantor, the result must be the same. For the deed is certainly a good agreement to convey the use for the benefit of the wife, after the death of the grantor, or a covenant to stand seized to the use of the grantor during his life, and, if his wife survives him, to her use during her life, and the remainder to A. P. Dodge. And in all states, where the statute of uses exists, this is held such a covenant, and to create such a use as the statute executes. *Roe v. Trammarr*, Willes 682, 5, 6; 2 Wilson 75; 2 Smith's Lead. Cas. 288, and notes Eng. and Am., where it fully appears that this is a trust of such a nature that, if not made operative under the statute of uses, equity will enforce it. See also the following cases, where such a contract is held as a good covenant to stand seized to uses, and operative under the statute of uses—*Ray v. Pierce*, 7 Mass. 381; *Humphrey v. Humphrey*, 1 Day 271; *Jackson, ex. dem. v. Swart*, 20 Johns. 85.

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A covenant to stand seized to the use of another, and indeed all uses which the statute of Henry VIII. executes, are to be founded upon valuable consideration, and, without the aid of the statute, constitute trusts in favor of third persons, which a court of equity will always enforce. Of this character are all defective conveyances. As if the deed be defective, in a statutory requisite, as wanting one witness, the estate would not pass. But still it would be regarded as a sufficient contract to convey, which in this state a court of equity would enforce, and in other states would be executed under the statute of Henry VIII. And this case is nothing different in the view taken of it by the defendant's counsel. The estate was attempted to be conveyed to the use of the wife during life, after the death of the grantor. But it failed in the requisite form. But a court of equity will no doubt enforce it, according to the intention of the parties. For the grantee A. P. Dodge, who gives a valuable consideration for this conveyance, must be regarded as having a pecuniary interest to have the life estate secured to the wife; this is such a right as he, and perhaps the wife also, may enforce in equity. It is sufficient, to secure the plaintiff from rendering an account of the avails of this property, if the equitable title is not in the estate, beyond what has already been used for paying debts.

The contract will, without difficulty, give the legal title of the personal property, and the usufruct or increase to A. P. Dodge, and the use in trust for the wife of the grantor. And being a contract under seal, this is equivalent to a contract of sale executed, or the price paid, with an agreement to have it take effect presently, when nothing remains to be done to identify the property, which is always sufficient, to pass the title as between the parties. And even a gift by deed, for valuable consideration expressed, is operative without delivery of the property.

The conveyance to A. P. Dodge of all the grantor's personal property will, we think, operate upon choses in action.

Judgment affirmed.

Hassam v. Dompler.

GEORGE P. HASSAM AND NAOMI HASSAM v. ISAAC DOMPLER.

Promissory note. Partial failure of consideration.

It is no defense to an action on a promissory note that its consideration, in part, was a piece of land conveyed to the maker, by the payee, by a warranty deed; and that the land was incumbered by a mortgage which the grantee has since paid.

ASSUMPSIT on a promissory note. Plea, the general issue; and pleas in offset in assumpsit, and for covenant broken. Replication, non-assumpsit to the plea in offset of assumpsit; and two special replications to the plea in offset of covenant broken,—to which the defendant demurred. The demurrers were overruled by the county court, and the replications adjudged sufficient, at the September Term, 1855.—POLAND, J. presiding;—and at the same term the issues of fact were, by agreement, tried by the court.

The plaintiff produced the note declared on, and its execution was admitted. The defendant then offered to prove that the note in question was given by the defendant, in part, for the purchase of a piece of real estate belonging to the said Naomi, which was conveyed by warranty deed by said plaintiffs to said defendant, on the day of A. D., ; and that there was, at that time, a mortgage outstanding on said premises, executed by the said George P., to one White, which the defendant, since the taking of said conveyance and execution of said notes, had paid off. This evidence was objected to by the plaintiffs, and excluded by the court, to which decision the defendant excepted. The defendant also took exceptions to the decision of the court, overruling his demurrers, but not insisting upon them in the supreme court, it becomes unnecessary to set forth either the plea, or the replications.

F. V. Randall for the defendant.

H. Carpenter for the plaintiffs.

The opinion of the court was delivered by

BENNETT, J. The defendant has made no point, as to the decision of the court, upon the demurrers to the plaintiff's pleas to the defendant's declaration in offset for covenant broken; and we shall treat that as waived,

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On the trial, the court excluded the evidence offered for the purpose of showing a partial failure of consideration for the note ; and the offer was, to show that the note was given, *in part*, for the purchase of a piece of land, which was conveyed to the defendant by a deed of warranty, and that there was an outstanding mortgage upon it, at the time, which the defendant has since paid off. We are to take the decision as made upon the offer of the defendant. The offer is not to show a rescission of the contract, for the defendant still retains the land conveyed him, and the covenants in his deed ; and the failure of consideration, at most, can only be claimed to be partial. It is not necessary to inquire what would be our decision, in a case where there had been an entire failure of consideration by an eviction, by an elder and better title. It might, in such a case, well be inquired whether the party should not be remitted to his remedy on the covenants in his deed to insure the title, though the cases on this point are not in unison ; but this is a case where the land itself only constituted a part of the consideration for the note, and for what part does not appear in the case ; and the failure of title has been only partial. The equity of redemption was in the plaintiffs, and that was fully conveyed.

It is well settled, in this state, that, in an action upon a note, evidence to show a fraud, which partially affects the consideration of the note only, is not admissible to reduce the damages. *Stone v. Peake*, 16 Vt. 218. *Burton v. Schermerhorn*, 21 Vt. 289. The sum which the defendant could claim should be deducted, in this case, is matter of liquidation, and not of computation. It does not appear from the offer of the defendant, that any distinct and separate valuation was put upon the land, as making up a part of the consideration for the note, ; and the value of the equity of redemption, which was conveyed, was a matter of liquidation from the testimony of witnesses.

In the present case, there is no ingredient of fraud. The defendant is chargeable with constructive notice of the incumbrance, and there has been no eviction. It does not appear from the offer, that the mortgagee took any measures to enforce the collection of his debt. In such a case as this, we are all clear that the offer of proof, as made, was properly overruled. The case of *Greenleaf v. Cook*, 2 *Wheaton* 13, is in point. See also *Lloyd v. Jewell*,

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1 Greenleaf, 352; 3 Fairfield, 127; 2 Kent's Com. Sec. 39, part 5, page 471, 472, and cases there cited. *Barkhamsted v. Case* 5, Conn. 528.

Judgment affirmed.

GEORGE B. PIERCE v. THE ESTATE OF CHARLES PAINE.

Statute of frauds. Agreement not to be performed within one year.

If the agreement, for the non-performance of which an action is brought, was not to be performed within one year, no recovery can be had upon it, although that which formed the consideration of the agreement was to have been, and was paid or performed within that period; and no recovery can be had for or upon the consideration so paid or performed, unless it enured to the benefit of the defendant.

Application of this principle to the present case.

ASSUMPSIT. The allegations in the declaration do not appear in any papers in the possession of the reporter, except so far as they are stated in the opinion of the court. Plea, the general issue; trial by jury, September Term, 1855,—POLAND, J., presiding.

The plaintiff testified that he was a stockholder in the Vermont Central Railroad Company, and by the rules of the company, established at the time they issued a new stock, at fifty cents on the dollar, he was entitled to take more than fifty shares of said fifty per cent issue, but that before the time limited for the stockholders to take the fifty per cent stock had expired, he had determined not to subscribe, and so informed the testator, whereupon he asked the plaintiff if he might have the benefit of his subscription, to which the plaintiff replied that he might; that a day or two after this he inquired of the plaintiff if he had subscribed for the stock, and he replied that he had not; that the testator thereupon told the plaintiff to subscribe for fifty shares of said fifty per cent stock, and pay for the same, and at the end of a year he would pay to the plaintiff his money back and interest thereon at any

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rate, and, if the stock rose, would divide the profits on it with the plaintiff; and that if, at the end of the year, the plaintiff should prefer to keep the stock rather than have it disposed of, he should have the privilege of doing so, and the profits should be determined by the then market price; that the plaintiff acceded to these proposals, and William Warner, the then treasurer of the railroad company, was called on to witness the arrangement; and that the next day the plaintiff went to the treasurer's office, and in pursuance of said arrangement, subscribed for fifty shares of said stock, and paid the first installment thereon, of \$750, and, in September and December following, paid the installments as they fell due, amounting in all to the sum of \$1,500. The plaintiff took certificates of the stock in his own name when he subscribed, and the payments were endorsed thereon.

The plaintiff also testified that he gave proxies of this stock by the direction of Paine, for the purpose of voting in the meetings of the company.

The plaintiff also read a deposition of Wm. Warner, the substance of whose testimony is sufficiently stated in the opinion of the court. The defendant introduced no evidence, and claimed, among other things, that the plaintiff could not recover because the contract was within the statute of frauds; but the court decided otherwise, and, as the defendant did not controvert any of the facts stated by the plaintiff, directed a verdict for the plaintiff. Exceptions by the defendant.

T. P. Redfield for the defendant.

One year was to elapse before any promise or duty assumed by the testator was to be performed.

If part of the contract is to be performed within one year, and part afterwards; see *Foot et al. v. Emerson*, 10 Vt. 338; *Hinckley v. Southgate*, 11 Vt. 428.

If the agreement be *wholly performed* by one party, leaving stipulations to be performed by the other party; see the opinion of Lord Ellenborough, in *Boydell v. Drummond*, 11 East 159; 1 Smith's L. C. 317-18; *Bracegirdle v. Heald*, 1 B. & A. 722.

A verbal contract to work two years, and partly executed, is within the statute of frauds. *Drummond v. Burrell*, 13 Wen. 307,

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An action cannot be sustained on a verbal promise to return the money paid on the purchase of a patent right, if the plaintiff did not within three years realize \$1000, profits. *Lapham v. Whipple*, 8 Met. 54. *Henning v. Butlers*, 20 Maine 119; 2 Steph. N. P. 1977. See also the case of *Manor v. Pyne*, 12 C. L. R. 43; *Broadwell v. Getman*, 2 Denio 87; *Foot et al. v. Emerson*, 10 Vt. 838; *Hinckley v. Southgate*, 11 do. 428; *Squier v. Whipple*, 1 Vt. 69; *Boydell v. Drummond*, 11 East 142; Smith's Leading Cases 316-17-18.

Vail and Peck & Colby for the plaintiff.

The provision in the statute of frauds, relied upon by the defendant, applies only to those contracts which are not to be performed, on either side, within one year. It does not reach a case where the contract is to be executed, on one side, within the year.

The case is not within the statute. *Donellan v. Read*, 3 Barn. & Adol. 899; 23 Com. Law 215.

- The opinion of the court was delivered by

REDFIELD, CH. J. This is an action of assumpsit upon a promise to pay the plaintiff the money paid out, and interest, if he would subscribe for fifty shares in the stock of the Vermont Central Railroad Company, and pay the amount of them, as the assessments fell due, which was within one year, if, after one year, the plaintiff should elect not to keep them, but to transfer them to the defendant. And if the plaintiff did then elect to keep them, and they were above par, he was to pay the defendant half the advance. It is claimed, on the part of the defendant, that this is a contract within the statute of frauds, as not to be performed within the year from its date, and not being in writing.

And it is replied to this, that, as it was to be performed, upon one side, within the year, that takes it out of the operation of this portion of the statute, and the case of *Donellan v. Read*, 3 Barn. & Adol. 899, 23 Eng. C. L. R. 215, is relied upon. There can be no doubt such a doctrine is declared in this case; but it is severely questioned by Smith, in his Leading Cases, 1 vol. p. 145, *et seq.*; and in the American note it is said, that it has been generally held, in this country, "that it [the statute] applies in all cases where the

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obligation or duty sought to be enforced, could not have been fulfilled within the year, and that an oral promise for the payment of money, or the performance of any other act, at a greater distance of time than one year, is consequently invalid, whether made upon an executed or executory consideration," citing *Cabot v. Haskins*, 3 Pick. 83; *Lockwood v. Barnes*, 3 Hill 128; *Boardwell v. Getman*, 2 Denio 87.

And the chief difference between the case of *Donellan v. Read* and the other cases is, that in the former case it is laid down that if one party is to perform and does perform all of his part of the contract, that takes the case out of the statute; and in the American cases cited, and in one late English case, *Souch v. Strawbridge*, 2 C. B. 808, by TINDALL, Ch. J., it is said that to entitle the party to recover on his part-performance within the year, when the other party was not bound to perform within the year, it must appear that the performance, on the part of the plaintiff, was accepted on the other side, or that it went to the benefit of the other side. And just here it seems to us comes the proper distinction.

If the contract has been performed on one side, in such a manner that the performance goes to the benefit of the other party, whether this was done within the year or not, it undoubtedly lays the foundation of a recovery against the party benefited by such performance. But when the contract, on the part of this party, was not to be performed within one year from the time it was made, the recovery is not upon the contract, but upon the *quantum meruit* or *valebat*, or upon the money counts. It is a recovery back of the consideration of a contract upon which no action will lie, and which has been repudiated by the other party.

And in the present case, if the plaintiff could be treated as the mere agent of the defendant, in making this subscription and payment of money, and the stock as being the defendant's stock, standing in the name of the plaintiff, there would certainly be no difficulty in the plaintiff recovering the money and interest. And this is the view taken of the plaintiff's case by the learned counsel on his behalf, and it is the only ground upon which it seems to us the action can be maintained, consistently with a fair and reasonable construction of the statute. For the statute is explicit, that no

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action shall be maintained upon any agreement not to be performed within the year. It is that portion of the agreement, or the contract sued upon, which comes within the statute, by not being to be performed within the year, and not that portion of the agreement which constitutes the consideration of the promise sued upon. It will make no difference in regard to recovering the price of the consideration, whether it is paid down, or paid within the year, or after the expiration of the year; or whether it is agreed to be paid at one time or another. If it has been paid, so as to go for the benefit of the other party, at any time, and he does not perform the contract on his part, a recovery may be had, but not upon the special contract, if not to be performed in the year, but for the consideration paid or performed by the plaintiff, and which came to the use of the defendant; and this recovery may be had upon the common counts, ordinarily, it is presumed. See note to 3 Pick. 95, by Judge PERKINS, citing *Lane v. Shackford*, 5 N. H. 133; 1 Fairfield 31, and 1 Pick. 328; 3 Wen. 219, and other cases.

But to say that this takes the whole agreement out of the operation of the statute, is virtually disregarding both its terms and all the beneficial objects of its adoption. It is the contract sued upon, which, by its being of older date than one year, exposes to the evils of fraud and perjury. And these evils are none the less because the consideration has been performed within the year. The consideration may be a pepper corn or a thousand dollars; it may be money, labor, goods, or a counter promise, and it may be executed or executory, and the danger of fraud or perjury is not materially increased or diminished. The danger of fraud and perjury is chiefly connected with the proof of that portion of the contract sued, and if that is not to be performed within the year, in our judgment, no action can be sustained upon the contract or agreement, consistently with a fair interpretation of the statute; and this, we think, is the only consistent result of the decided cases upon this point.

The case of *Donellan v. Read* was where improvements upon premises in the occupancy of a tenant, had been made at his request, upon a contract to pay an increased rent during the remainder of his term, which was more than one year. He enjoyed the

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benefit and use of the improvements, and declined to pay for them. The court held the contract not within the statute. This was immaterial to the recovery. The defendant had received the benefit of the improvements, and had agreed to pay £5 for the use annually. This contract was not binding, or could not be sued specially, but a recovery could be had for the use, and that is all this case decides; the declaration containing the count for use and occupation, and the money counts. It is like the case of a contract to demise premises for five years, without writing. No action can be maintained upon the contract. But if the defendant occupy the premises, a recovery may be had for the use and occupation, and the agreed rent may be adopted, as the probable value of the use. So the argument of LITTLEDALE, J., in this case, which seems to have been regarded by him as quite conclusive, is nothing more than saying, if one party, after having received goods or money on a contract, within the statute of frauds, repudiates the contract, he must answer for the money or goods. It is said this case has been reaffirmed in a late case in the Exchequer, *Cheney v. Heming*, 4 Exch., 631. But as it does not go further than *Donellan v. Read*, it requires no further answer; it is, indeed, far more questionable than *Donellan v. Read*. And *Holbrook v. Armstrong*, 1 Fairfield, 31, which is sometimes referred to upon this point, as confirming the case of *Donellan v. Read*, is only a recovery for money or goods which came to the defendant's use.

We must then fall back upon the ground quoted from Mr. Wallace's note, and the cases referred to, that no recovery can be had if the *contract sued upon* was not in writing and not to be performed within one year. And no recovery can be had upon the consideration unless it has come to the defendant's use.

To apply this to the present case, no question is made that the defendant's portion of the contract was not to be performed within the year, inasmuch as one full year was to expire before the plaintiff made his election whether to transfer the stock to the defendant or not, and this was to determine the defendant's obligation. If the plaintiff elected to keep it, he could, and the profits, for that term, were to be divided. If he elected to transfer, the defendant was to pay him the money he had paid out, and interest, and the

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profits to be divided between them, the defendant to pay half the advance in price; so that clearly the defendant could not know what was the nature of his obligation till after the year had expired. This is the plaintiff's own version of the facts. The witness, Warner, finally said he thought the defendant guaranteed the stock to be good at the end of the year, or that he would then take it and pay the cost and interest, and half the advance in price, if any. But all the testimony gives one full year before the defendant's obligation attached; of course it could not be performed within the year.

Upon the point whether the payment of the money came to the defendant's use, so that it may be recovered back, it seems very clear to us, that it did not. The plaintiff himself says that he had an election to keep the stock himself, at the end of the year. The stock was not then to become the defendant's till the end of the year, and there is no pretence it ever did become his, so as to vest any title or use in him, unless a proxy may be so regarded, and we think this is no use for which any recovery can be had.

In looking into the cases, the leading case of *Peter v. Compton* is a full authority to show that it makes no difference as to the binding force of a contract, not to be performed within the year, that it is performed within the year, upon one side. In that case the consideration was paid down. And this case is not questioned, except that incidentally it is said to be limited by *Donellan v. Read*. But CH. J. TINDALL puts this upon the true ground, in *Souch v. Strawbridge*, 2 C. B. 808, that there may always be a recovery when there has been full performance on one side, accepted, or which comes to the use of the other. But in the present case nothing came to the defendant's use. So, too, in *Broadwell v. Getman*, 2 Denio 87, BEARDSLEY, J., fully maintains the ground that if the portion of the contract *sued* was not to have been performed within the year, no action can be maintained upon the contract, and that to hold the contrary is virtually to disregard the statute. The same is expressly decided in *Lapham v. Whipple*, 8 Metcalf 59. WILDE, J., says, "To support the action, the plaintiff must prove the contract, and the object of this part of the statute was to prevent the proof of verbal agreements when, from the lapse of time,

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the witness might not recollect the precise terms of the agreement." And in *Lockwood v. Barnes*, 3 Hill 131, it is said, and has been so held by this court, that a recovery may always be had for performance, or a part performance, on one side, of a contract, within this or any other section of the statute of frauds, if repudiated by the other party, and this part performance came to the use of the other party. But the payment or performance of the consideration of an agreement or contract, within any section of the statute of frauds, never takes it out of the statute; if it were so, no contract upon an executed consideration would ever come within the statute. But in all cases of contracts within the statute, where the promisee has done something towards the performance of the contract on his part, and the other party declines to perform on his part, a recovery of what is thus done may always be had, and this is all that the performance of such contract on one side will avail at law, and this only when such performance on one side enures to the benefit of the other side.

Judgment reversed and case remanded.

HARRIETT BARNES v. JONATHAN WYETHE.*Marriage annulled on account of fraud &c.*

A marriage annulled on the ground of fraud, where it appeared that the petitioner was imposed upon, and the marriage brought about by the authorities of the town, to which she was chargeable as a pauper, by their hiring the petitionee, whose settlement was in a different town, to consent to the form of a marriage without afterwards fulfilling or intending to fulfil its obligations, and with no other object except to impose upon the town of his settlement the expense of the petitioner's maintenance.

PETITION FOR A DECREE OF NULLITY of a marriage contract between the petitioner and petitionee. The facts upon which the petition was based, so far as they were sustained by the testimony,

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sufficiently appear in the opinion of the court, which, after argument by

O. H. Smith for the petitioner; and by

Peck & Colby for the petitionee,

was delivered by

REDFIELD, CH. J. We are satisfied, in this case, that the form of marriage was brought about between these parties, chiefly through the instrumentality of certain inhabitants in Moretown, who had the charge of maintaining the town's poor, for the purpose of changing the settlement of the petitioner; and that, to effect this, they promised Wyethe \$ 100, and paid him \$ 60; that his purpose was not to contract, in good faith, a marriage, but to get money, and revenge an imaginary grievance against Middlesex, and abandon the petitioner, which he did in about three weeks. She is a cripple, feeble both in body and mind, and was wholly at the disposal of those who had her in charge. It is difficult to lay down any general rule in regard to the precise character of fraud which will render null a marriage contract. But we are reluctant to say, that such a transaction as the present, is to receive the countenance of the courts of the state. It would, we think, be of evil example. The transaction possesses no one feature of a marriage contract, but the ceremony. The cohabitation so long as it continued, seems to have been, on the part of the petitioner, the result of the general imposition; and, on the part of the defendant, a part of the attempted villany. A decree of nullity, if it have no other good effect, (and, as to the parties, it seems to be of no great importance, both being virtual paupers,) will deprive the conspirators of the wages of their iniquity, and be of good example to others. We are not satisfied there was any such duress in the case, as to justify a decree of nullity. But one of the chief actors testifies that he told the petitioner the laws were so altered that the town authority said they had a right to marry paupers to whom they saw fit; and the petitioner testifies that she believed it, and supposed that, if she refused to submit to the marriage, she should be left to starve. It is impossible to know how much such badinage might have influenced so simple a creature in the outset; but we are not satisfied she finally acted under the delusion, and still she might have done. Petition granted.

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ARAD JACKSON v. E. P. WALTON, *Trustee of R. F. ABBOTT.**Reclaiming personal property. Trustee process.*

The right of the owner of personal property to reclaim it, if he can identify it, does not exist when the property has been annexed to another persons freehold and become a part of the realty.

The principal defendant quarried, dressed, sold and delivered to the trustee a quantity of granite and laid it down for a permanent walk on the trustee's premises. He obtained the stone without right from the quarry of a third person, who, after the walk was laid, claimed them as his property. *Held*, that the property in the stone was in the trustee after they were laid into a walk, and that the trustee was indebted to the principal defendant, and liable as his trustee, at least for the increased value of the stone which was produced by their being quarried, dressed and delivered.

TRUSTEE PROCESS. The trustee disclosed as follows :

"Sometime in the year 1852, I said to Mr. R. F. Abbott that I "wanted some stone for a front walk. He replied that he could "probably procure or furnish them. In the month of August, "1853, Mr. Bradish served a trustee writ upon me as indebted "to said Abbott. I had not then received the stone of any one. "On the afternoon of the same day, or the forenoon of the next, "(I am not certain which,) Mr. Moses Peck said to me that he "had some granite stone for a walk to deliver me as the property "of Mr. Drury, who had employed him to bring them ; and that he "should deliver them only as the property of Mr. Drury. I said "to him he might so deliver them, and he did so. Mr. Abbott "laid the stone for me, and received his pay therefor by an order "on E. P. Walton & Son."

Commissioners were appointed, who reported that the trustee was indebted to the principal defendant in the sum of sixty dollars, and chargeable for that sum ; subject to the opinion of the court upon the following facts.

The debt of the trustee is for 114 feet of hewed granite stone, delivered to him by Abbott, on the 3d day of August, 1853, for a walk from his front door to the street, with curb stones at the sides, which were immediately laid down, and have been ever since, and are now used for that purpose. These stone were taken from a granite quarry owned by Erastus S. Camp, and mostly after March 10, 1853. Some time previous to that time, Abbott made an arrangement with Alvan Drury to take a lease of this granite

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quarry from Camp ; Abbott paying or securing the rent, so that Drury was not to pay or be holden for it, in any way, at any time. Abbott then applied to Camp for a lease to Drury ; and Camp subsequently executed one in duplicate, but it was never accepted or executed by Drury. The rent, as stipulated in the lease, was \$ 35, per year, but it has never been paid. Drury declined to pay it, and the commissioners found that he was not liable for it, and they did not find that either Drury or Abbott had any right to take stone from the quarry till the rent was provided for in some way, which had never been done. The stone were worth in the quarry one cent per foot. In laying them down for a walk at the trustee's house, the space to be occupied by the walk was first dug out and a foundation of rough stones laid, upon which the flat granite stones, three in number, were placed. The face of the flat stones, was upon the same level as the earth surrounding. The curb stones were set in the earth by the side of these flat stones, arising above them four or five inches. For some two feet in width at the side of the curb stones, the soil was raised nearly to the height of the curb stones, which were set in the earth about six or eight inches below the upper surface of the flat stones. The walk was cut and fitted for the place it occupies, but can be removed without doing any damage to the dwelling house of the trustee.

At the time of the service of the writ in this suit Abbott was indebted to Drury. The stone were attached on the plaintiff's writ in this suit, as the property of Abbott, and were then in the charge of the teamster, Moses Peck. Thereupon Abbott requested said Peck to deliver the stone to the trustee as the property of Drury, which the said Peck then did as is narrated in the trustee's disclosure, all the facts stated in which the commissioners found to be true. After this, the attachment of the stones was abandoned and the trustee process relied upon to secure the debt. Drury knew nothing of Abbott's contract with the trustee, and nothing of these stone until the present suit was commenced.

During the hearing before the commissioners, and near its close, Camp notified the trustee, that he claimed said stone as his property. He did this upon learning that Drury denied all liability for the rent of the quarry, Abbott being wholly irresponsible.

Upon the facts so disclosed and reported, the county court,

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March Term, 1855,—POLAND, J. presiding,—adjudged the trustee chargeable for the sum reported. Exceptions by the trustee.

O. H. Smith for the trustee.

The ownership of a thing, whether real or personal, carries with it the right to all that the thing produces, and to all that becomes united, attached or interwoven with it, provided only, that its identity be not destroyed. This principal was recognized by the civil law; Wood's Inst. Civ. Law, 92; and in the 5th Henry VII. "after solemn argument on demurrer" was held to be law in England; and has never ceased to be so considered, and is recognized in *Betts et. al. v. Lee*, 5 Johns. 348; *Curtis v. Groat*, 6 Johns. 169; *Silsbury & Calkins v. Mc Coon & Sherman*, 6 Hill 425; *Baker v. Wheeler & Martin*, 8 Wend. 505; *Chandler v. Edson*, 9 Johns. 362; *Babcock v. Gill*, 10 Johns. 287; *Brown v. Sax & Kimble*, 7 Cowen 95; *Miller v. Humphrey*, 2 Marshall 449; *Burnes v. Johnson*, 1 J. J. Marshall 197; 2 Johns Ch. R. 62; *Barron v. Cobleigh et al* 11 N. H. 558; *Ryder v. Hathaway*, 21 Pick. 298; 2 Black. Com. 404; 2 Kent's Com. 296; 1 Bouv. Inst. 197, 199; Bac. Abr. Trespass, E. 2; 2 Rolle 393, 566.

Walton cannot be adjudged the trustee of Abbott, even if the stone have been attached to the freehold, which we deny, for Camp may maintain trover for their conversion. Abbott could convey no title to Walton as he himself had none. The property still remained in Camp and no tortious act of Abbott or Walton could divest him of it. *Buckmaster v. Mower et al.* 21 Vt. 204. See also *Martin v. Porter*, 5 M. & W. 351; *Wingate v. Smith*, 20 Maine 237.

Merrill & Willard for the plaintiff.

The stones became a part of the trustee's realty; and after property has been taken from the owner and converted into real estate, the owner cannot reclaim it. *Silsbury & Calkins v. Mc Coon & Sherman*, 6 Hill 425; S. C. 4 Denio 332; *Brown v. Sax*, 7 Cow. 95; Bro. Ab. tit. Property, pl. 23. By the civil law a similar rule is prescribed. 2 Kent's Com. 364; Bacon's Ab. Trespass, 580.

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The stone in the quarry were worth \$ 1.14, and were, by the labor and skill of Abbott, increased in value so as to be worth \$ 60. This is to be likened to the case of the fine painting on canvass, where the owner of the canvass is not held to be the owner of the painting. The principal part was furnished by Abbott. Camp's part was trivial. 2 Kent's Com. 362.

The opinion of the court was delivered, at the circuit session in September, 1856, by

BENNETT, J. This case comes up on exceptions to the decision of the county court rendering the trustee chargeable. It seems the case must turn upon the question, to whom did Mr. Walton owe this debt? If not to Mr. Abbott, he should not be adjudged chargeable. It is found in the case, that some time in the year 1852, Mr. Walton spoke to Mr. Abbott for the stone, and that he was answered by Mr. Abbott that he, Abbott, could probably furnish them; and it is expressly found by the commissioners that Abbott did deliver the stone to Mr. Walton on the third day of August, 1853, and that he received them and used them for the purposes for which they were designed. These facts are abundant, to show an indebtedness from Walton to Abbott, unless there is enough in the case to control them. It is claimed, however, that this debt belonged to Drury, and not to Abbott. It becomes important to see what the facts are bearing upon this point. It is true, the trustee discloses that one Moses Peck told him he had some stone for a walk to deliver him, as the property of Mr. Drury, who, he said, had employed him to bring them; and that he should only deliver them as the property of Mr. Drury; and the trustee says he told him he might so deliver them, and he did so. But still it is found that Abbott really delivered the stone, and that he in fact requested Peck to deliver the stone to the trustee as the property of Drury, which was done; and that Drury knew nothing of Abbott's contract with the trustee, and nothing about these stone until the present suit was commenced. There is nothing in the case to show that Drury had any interest in the stone, or that Abbott could be regarded in any sense, as acting as the agent of Drury; but the case shows the reverse, and that Abbott quarried out these stone for and on his own account.

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Upon such a state of facts, no debt can be claimed, as being due from the trustee to Drury. Drury was but a man of straw; and though Abbott caused Peck to act ostensibly in his name, yet it was without any authority, and without any interest in Drury; and what was done was in truth done by Abbott, as the commissioners have found. The disclosure of the trustee simply affirms, that Peck *assumed* to act for Drury in the delivery of the stone; and that the trustee consented that the stone should be delivered and received as the property of Drury. This would not necessarily make them so, as matter of fact.

It is further objected by the trustee, that he should not be *chargeable* as the trustee of Abbott, upon the ground that Abbott quarried these stone from a quarry belonging to one E. S. Camp, without any right, and was a trespasser in so doing; and that consequently, it is said, the trustee is liable to Camp for the value of the stone, and should not be held liable to the principal debtor. But suppose it be conceded that Abbott trespassed upon the rights of Camp in quarrying the stone, and might have been sued in tort by Camp for the injury done him, does it follow that Camp can sue the trustee in assumpsit, or tort and recover the value of the stone? These stone were purchased by Mr. Walton for a walk from his front door to the street, and were used for this purpose; and when these stone had been laid down in the manner detailed in the bill of exceptions, they became a part of the trustee's realty, as much so as if they had been stone for a wall, and had been, not only purchased for that use, but had been actually laid into stone wall upon his farm. Though it may be true that, whatever alteration there may be in the form of property, if the owner can prove the *identity* of the original materials, he may still seize it in its new shape, yet this right only exists so long as the *identity* of the original materials can be established. This principle, however, does not apply to cases where the property, illegally taken, has lost its *identity*, or has been annexed to the freehold. It then becomes a part of the realty, and its nature is changed. 6 Bacon, Trespass, p 580. See, also, 7 Cowen 95; 6 Hill 425.

Though it might be true, that in an action of trespass against Abbott, the measure of damages might be the value of the stone at the time of the asportation, and in an action of trover, the value

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at the time of the conversion, as evidenced by a demand and refusal, even although the value had been increased by the previous tortious acts on the part of the defendant, which might have subjected him to an action; yet it does not necessarily follow, that the same rule of damages would obtain in a suit against Abbott's vendee. It is to be presumed that Walton bought the stone in good faith, and was not guilty of any intentional wrong upon the rights of Camp, and when the trustee had annexed these stone to his freehold, the title to them would not attach in Camp, but they would belong to the trustee, when they became a part of his realty. The right of property was thereby changed, and, however it might be in a suit against Abbott and upon which we have no occasion to express any opinion, we think Walton could not be held liable to Camp for the increased value of the stone produced by their being quarried, wrought and delivered to the trustee by Abbott.

The amount of hewed stone delivered was 114 feet, and the value of these stone in the quarry, is found to be one cent per foot. If it was to be conceded that, in an action by Abbott against Walton for the value of the stone, Walton would have the right to retain to the amount of the value of the stone in the quarry, upon the ground of his liability to Camp yet this cannot lead to the reversal of the judgment of the county court. The commissioners decided from the disclosure and facts found by them, that Walton was indebted to Abbott in the sum of sixty dollars, and was his trustee in that sum. It is no where found that this sum was the precise value of the stone as delivered; and, for ought which appears from the commissioner's report, they may have deducted the value of the stone while in the quarry, from what would otherwise be the amount of Walton's indebtedness. It is consistent with the report that they should have done it; and we are not to presume they did not, for the sake of reversing the judgment of the county court. The case of *Martin v. Porter* 5 M. & W. 351, and *Wingate v. Smith* 20 Maine 287, to which we have been referred by the defendant's counsel, are not cases where a change in the title to the property had been effected.

Judgment of the county court is affirmed against the trustee with costs, and is, *pro forma*, affirmed against the principal debtor without costs.

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LEWIS CHATFIELD v. WALTER M. WILSON.

Underground water. Mere motive not actionable.

There are no correlative rights existing between the proprietors of adjoining lands, in reference to the use of the water in the earth, or percolating under its surface. Such water is to be regarded as part of the land itself, to be enjoyed absolutely by the proprietor within whose territory it is; and to it the law governing the use of running streams is inapplicable.

An act legal in itself, and which violates no right, cannot be made actionable on account of the motive which induces it.

ACTION ON THE CASE for the disturbance of a water course. The declaration contained three counts, the first and second charging the defendant with having lowered and changed the channel of a brook, which divided the farms of the plaintiff and defendant, and diverting the water therein; and the third complained of an interference by the defendant, with the natural flow or passage, by percolation, of the water through the defendant's land, to the plaintiff's, by means of which a reservoir or tub on the plaintiff's land was supplied with water. Plea, the general issue; trial by jury, March Term, 1855,—POLAND, J., presiding.

The plaintiff's evidence tended to prove that the defendant's farm lay north and east of the plaintiff's; and that the plaintiff's farm and the defendant's land lying north of it were divided by a small brook, which came from a spring further east on the defendant's land, and run westerly, and that sometimes, in the summer, the brook would become wholly dried up. At the north-east corner of the plaintiff's farm, and on the south side of the brook, there was a small piece of level ground, some ten or fifteen feet wide, and extending up and down the brook about two rods, which was partly on the plaintiff's land, and partly on the defendant's land lying east; that this piece of flat ground was wet, porous and spongy, so that by digging into it the cavity would fill with water; that, prior to the act of the plaintiff in laying his aqueduct as hereinafter stated, there was no water apparent on the surface of this piece of flat ground, and no appearance of a spring of water there, but that the water in the soil came from the brook above by percolation through the soft soil and upon the surface of the flat rock under the soil; that some four or five years previous

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to the spring of 1852, the plaintiff, by leave of the defendant, dug a hole in this piece of flat ground, a few feet over the line on the defendant's land, and in this hole placed a tub which filled with water, and laid an aqueduct of lead pipe from the tub to his buildings, and from that time up to the spring of 1852, procured in this manner an ample supply of water for his buildings, for which he paid the defendant annually the sum of one dollar and fifty cents; that in the spring of 1852, there was some difficulty between the plaintiff and the defendant, and the defendant notified the plaintiff to remove his tub and pipe from the defendant's land, and the plaintiff, accordingly, took up his tub, and placed it in a hole in the flat ground on his own side of the line, but within a short distance of it, and also very near the bank of the brook; that his lead pipe was placed in this tub, and that he continued to be well supplied with water until about the first of July, 1852; that the tub, when placed on the plaintiff's own land, was sunk to the depth of a foot or more below the channel of the brook, and that the tub and aqueduct were supplied with water by the filtration of the water from the brook directly, and also through the soil and under the soil, on the defendant's side of the line. The plaintiff's evidence also tended to prove that about the 1st of July, 1852, the defendant dug away and lowered the channel of said brook, beginning some two or three feet above, and east of the plaintiff's corner, and extending twelve or fifteen feet below, so that the water of the brook was thereby made to run in the new channel, two or three feet further north, and about a foot lower than before; that the defendant also dug a channel from the hole where the plaintiff's tub had formerly stood in his land, out into the channel of the brook, so as to carry all the water which collected there into the new channel he had made for the brook, above the plaintiff's corner; and that the defendant filled up the side of this channel, from the hole or spring to the brook on the side next to the plaintiff's tub with dry hard earth, so as to prevent any filtration of water, through or under the soil on his land, to the plaintiff's tub, and that these acts of the defendant, prevented the water from accumulating in the plaintiff's tub, either *from the brook directly or through or under the soil of the defendant's land, and that the plaintiff thereby was wholly deprived of water by his said aqueduct*; and that these acts of the defen-

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dant were not necessary, and were not done by the defendant with any purpose of supplying himself with water, for any purpose, but solely with the design of thereby depriving the plaintiff of water by his aqueduct. The defendant claimed, and his evidence tended to prove that, previous to the plaintiff's putting his tub and pipe into the defendant's land, as above stated, there was an open visible spring of water, where the tub was placed, the water from which flowed north into the brook on the defendant's land, in a natural channel, and that there was never any such flow of the water of the brook through or under the soil on the defendant's land, as the plaintiff claimed. The defendant also claimed that the plaintiff's tub, after the same was placed on his own land, was not supplied with water by the natural percolation of the water through the soil, either from the brook, or from the water of this land or spring, but that it was supplied with water from the defendant's spring, through a blind or underground ditch, which the plaintiff had made without his license or permission, and that the only effect of his acts, of which the plaintiff complained, was to restore the flow of the water to its natural condition, as it was before anything had been done by the plaintiff. The defendant also claimed that what was done by him, was done for the purpose of providing water for his pasture, and not to injure the plaintiff; and he also denied making any change of the channel of the brook, as claimed by the plaintiff. The charge of the court relative to the turning of the channel of the brook was not excepted to. In relation to the other part of the case, the court charged (among other things not excepted to,) that the defendant had a right to prevent the flow or escape of water from his own land to the plaintiff's tub by any artificial means that the plaintiff had used to obtain it, and that he might lawfully do all that was necessary to restore the water to its natural flow, and that it was not material what his purpose or motive was; and that the defendant would not be liable for any act of his, upon his own land, in preventing the natural flow or escape of water, in or under the soil from his land to the plaintiff's, provided such act was done for the purpose of reasonably providing himself, or his farm or cattle, with a supply of water; but if they found that the acts of the defendant did prevent the *usual* and *natural* flow of the water, in or under the

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ground from the defendant's soil to the plaintiff's, and that these acts were done by the defendant solely with the purpose of injuring the plaintiff, and depriving him of water, and not with any purpose of usefulness to himself, then he would be liable to the plaintiff for such damages as he thereby sustained. The jury returned a verdict for the plaintiff on all the counts in his declaration. To so much of the charge as is above detailed, the defendant excepted.

————— for the defendant.

There was error in the charge that, if the defendant prevented the percolation in order to deprive the plaintiff of the water, without any purpose of usefulness to himself, he would be liable, &c.

In the well-considered case of *Acton v. Blundell*, 12 M. & W. 324, no such distinction is made, and the doctrine of the absolute right of the owner of the soil, to the entire control, at will, of this species of water, on his own land, is fully established. See also *Greenleaf v. Francis*, 18 Pick. 117.

If underground water in its percolations and filtrations, from its peculiar nature, and from our ignorance of its course, and the laws that control it, is not subject to the law as it applies to running water, then that of it which is on any man's land, like any other thing which makes the soil, or is contained in it, is absolutely the owner's.

The entire dominion of the owner over his own soil is settled beyond question. *Thurston v. Hancock*, 12 Mass. 220; *Panton v. Holland*, 17 Johns. 92.

If a man does an illegal act with a *good* motive, he is nevertheless liable to an action; so, if he does a legal act with a *bad* motive, no action will lie against him. *Hathaway v. Allen*, Brayton, 152. Buller's N. Prius 14. *Runnels v. Bullen*, 2 N. H. 532. *Greenleaf v. Francis*, 18 Pick. 117. In this last case the court say, "every one has the liberty of doing in his own ground whatsoever he pleases, *even though it should occasion to his neighbor some other sort of inconvenience.*"

O. H. Smith and *F. V. Randall* for the plaintiff.

The flowing of the water in its natural course to the plaintiff's land was an incident thereto, as much as the right to have the soil

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itself, in its natural state, unaltered by the acts of the defendant, who could not lawfully dig, so as to deprive it of the support of his land. *Tyler et al. v. Wilkinson et al.* 4 Mason 401.

The defendant had a right to use the water of the spring, and the water of the brook in common with the plaintiff, but he was bound to exercise that right in a reasonable manner; and if he diverted the water maliciously or wantonly, to the injury of the plaintiff, he would be liable in damages. *Twiss v. Baldwin*, 9 Conn. 291. *Hay v. Stennell*, 2 Watts 327. *Greenleaf v. Francis*, 18 Pick, 117. Gale and Whatley on Easements, 243-4 n. *Platt v. Johnson & Root*, 15 Johns. 213. *Panton v. Holland*, 17 Johns. 92.

The opinion of the court was delivered, at the circuit session in September, 1856, by

BENNETT, J. This is the first time, within my knowledge, that the question has ever come before our courts, in relation to the rights of adjoining proprietors of lands to water percolating under the surface, through wet and porous ground, and the case may be considered somewhat important in principle, as well as novel, in this state. The court below, on this point, told the jury, in substance, that the defendant had the right to prevent the escape of water from his own land to the plaintiff's tub, which he had sunk on his own land, and that he might lawfully do all that was necessary to restore the water to its *original* flow, and that it was not material what his motive was; and that he had the right, on his own land, to prevent the natural flow or escape of water, in or under ground, from his to the plaintiff's land, provided it was done to secure, in a reasonable manner, a supply of water for himself, his farm, and cattle; but if done *solely* to injure the plaintiff, and deprive him of water, and not to benefit himself, then he would be liable. This charge is evidently based upon the ground that there were certain *correlative rights* existing between these parties, in the use of the water percolating in and under the surface of the earth. The rules of law which govern the use of a stream of water, flowing in its natural course over the surface of lands belonging to different proprietors, are well settled, and the *correlative rights* of the adjoining proprietors are clearly defined. Each pro-

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prietor of the land has the right to have the stream flow in its natural course over his land, and to use the same as he pleases for his own purposes, not inconsistent with a similar right in the proprietors of the land above or below him, but no proprietor above can diminish the quantity or injure the quality of the water, which would otherwise naturally descend, nor can any proprietor below throw back the water upon the proprietor above, without some license or grant. But we think the law governing running streams is not applicable to underground water, and that no light can be obtained from the law of surface streams; and if it is to be established that there are *correlative* rights existing, between adjoining proprietors of land, to the use of water percolating the earth, an entire new chapter in the law will be necessary to define what these rights are, and to put them on some tangible and practical ground, that the rules concerning them may be applied to common use. But from the very nature of the case, this seems impracticable. ,

The laws of the existence of water under ground, and of its progress while there, are not uniform, and cannot be known with any degree of certainty, nor can its progress be regulated. It sometimes rises to a great height, and sometimes moves in collateral directions, by some secret influences, beyond our comprehension.

The secret, changeable, and uncontrollable character of underground water, in its operations, is so diverse and uncertain that we cannot well subject it to the regulations of law, nor build upon it a system of rules; as is done in the case of surface streams. Their nature is defined, and their progress over the surface may be *seen* and *known*, and is *uniform*. They are not in the earth and a part of it, and no secret influences move them, but they assume a distinct character from that of the earth, and become subject to a certain law,—the great law of gravitation.

There is, then, no difficulty in recognizing a right to the use of water flowing in a stream as *private property*, and regulating that use by settled principles of law. We think the practical uncertainties which must ever attend subterranean waters is reason enough why it should not be attempted to subject them to certain and fixed rules of law, and that it is better to leave them to be

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enjoyed absolutely by the owner of the land, as one of its natural advantages, and in the eye of the law a part of it, and we think we are warranted in this view by well-considered cases.

In the case of *Acton v. Blundell et al.*, 12 M. & W. 324, it was held that the owner of land, who had made a well in it, and thereby enjoyed the benefit of underground water, had no right of action against an adjoining proprietor, who, in sinking for and getting coal from his own soil, in the usual and in a proper manner, caused the well to become dry. A query is added whether it would have made any difference if the well had been enjoyed by the plaintiff for more than twenty years. In the case of *Koath v. Driscoll*, 20 Conn., the doctrine is fully advanced that no right is gained by a mere continued preoccupation of water under the surface by any artificial means for a period of fifteen years or more. The court say, "each owner has an equal and complete right to the use of his land and to the water which is in it;" and they say "the water combined with the earth, or passing through it by percolation, or by filtration, or chemical attraction, has no *distinctive character of ownership* from the earth itself, any more than the metallic oxyds, of which the earth is composed," and they further add, "water, whether moving or motionless, in the earth, is not, in the eye of the law, distinct from the earth." If it is true that subterranean water is to be treated as a part of the earth, it must follow that there are no *correlative rights* in the enjoyment of such water, between adjoining proprietors of land, and both the case in the 12th of M. & W. and 20 Conn. proceed upon that ground. The case of *Greenleaf v. Francis*, 18 Pick. 117, goes upon the same principle, and it was there held that no action would lie against a man who dug a well on his own land, although he thereby took the water from his neighbor's well, in the absence of all right acquired by grant, or an adverse user. The case is really put upon the ground that "every one has the liberty of doing, on his own ground, whatever he pleases, even though he occasion some damage to his neighbor;" and the court say, "there is nothing in the case, then at bar, which limited or restrained the owners of the estates severally, from having the absolute dominion of the soil extending upwards, and below the surface, as far as each pleased." This, in effect, negates the position that there can be, upon common principles, *correlative rights* in underground water.

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The case of *Dickinson v. The Grand Junction Canal Company*, 9 Eng. Law and Eq. 520, is not opposed to the views taken in the foregoing cases. In that case the water was proved to have been taken from the river, after it formed a part of the stream, not by reasonable use by another riparian proprietor, but by digging a well; and this was treated as a diversion of *surface water*, and *actionable* at common law; and, in regard to the abstraction of the water which never did form part of the river, but had been prevented from doing so by the sinking of the wells, it was held, that the mill-owners, being entitled to the benefit of the stream in its natural course, were deprived of part of that benefit, if the natural supply of the stream was cut off, and might have their action, whether the water cut off was a part of an underground water course, or percolated through the strata of the earth. In this case the injury complained of was the diminution of water in a surface stream, and the law applicable to surface streams was applied. The cases, cited by the plaintiff's counsel, which relate to surface streams can give little or no aid in the question before us. The case of *Smith v. Adams*, 6 Paige 435, is also a case where the underground water, which was cut off by an excavation on the defendant's land, supplied a spring, and this spring caused a flow of surface water, and the decision was, that the person who had the right to the use of the water in its natural course, or by a prescriptive right, out of its natural course, and was injured by the excavation, might have redress for the injury. Here, too, the person complaining was injured in his rights to the use of flowing water. Such is also the case in *Balston v. Benstead*, 1 Campbell 463, and no doubt other cases of a like character may be found in the books.

There is no ground to claim that the plaintiff has been injured in his right to the use of water in a surface stream flowing in its natural channel, so far as the case is now before this court, and he can claim no prescriptive right to the water.

The tub was sunk by the plaintiff on his own land, in 1852, and as his evidence tended to prove, a foot or more below the channel of the brook, and that, from this tub, the water was taken by artificial means for the use of the plaintiff; and the case shows that the plaintiff's evidence tended to prove that this tub was supplied with water, which filtrated under ground from the brook, and also from the adjoining land of the defendant; and the case, so far as it is

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sent up to us, only concerns the right of the defendant to cut off the filtration of the water from his own land to the plaintiff's tub by artificial means, and the consequences, if wantonly done.

This then, is fairly a question, as to the rights of the plaintiff in underground water. Putting this case, then, upon the ground that the water in question, while in the earth of the defendant, though percolating through it, is not distinct from it, in the eye of the law it becomes an important inquiry whether the act of the defendant, in the obstruction of the under ground water upon his own premises, can be made actionable, simply upon the ground that the motive was bad which induced it. The act of the defendant in the obstruction of the water, being in itself lawful, could not subject the defendant to damages unless, by reason thereof, some right of the plaintiff has been violated. The maxim, "*Sic utere tuo, ut alienum non laedas*," applies only to cases where the act complained of violates some legal right of the party; and it has been attempted to be shown that this underground water cannot be made the subject of *correlative rights*. It is said in Comyn's Digest, under the head of Nuisance, that an action on the case does not lie for the *reasonable* use of any right, though it be to the annoyance of another. This, it may be said, implies that an action would lie if the use of one's right was *unreasonable*.

This, no doubt, is true, under proper limitations, as in cases where there is a right common to both parties, as in the use of a public highway, or of the air; or where there is a duty to perform, and a *correlative* right growing out of it, as the repair of a ruinous house standing so near to the house of another, as to endanger it from its fall. In such a case, no doubt, a repair could be compelled; and, in case of the fall, an action would lie for the special damage. There are also many cases in the books, relating to the relative use of surface streams, where the case has turned upon the question, whether the use was reasonable, and for the party's own convenience or benefit, or wanton and malicious, and done to prejudice the rights of another. In such cases there are *correlative* rights to the use of the water, and the boundary of the right is a *reasonable use* of it. But such cases have no analogy to the case at law, and it may be laid down as a position not to be controverted, that an act legal in itself, violating no right, cannot be made *actionable* on

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the ground of the motive which induced it.) Such was the case of *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505. If the act is lawful, although it may be prejudicial, it is *damnum absque injuria*. On this point the case of *Mahan v. Brown*, 13 Wend. 261, is a direct authority. There the defendant had built a high fence for the sole purpose of obstructing the lights of his neighbor's house; and it was held, that no action would lie, where the lights were not ancient, and no right had been acquired by grant or user; and that the motive with which the act was done was immaterial. This case goes upon the ground, that the plaintiff was not injured in a legal right.

This is not like the case where the air is contaminated so as to become noxious. There a correlative right is invaded. In the case of *Greenleaf v. Francis*, 18 Pick. 117, it is true, the court charged the jury that if the defendant dug the well where he did, upon his own land for the purpose of injuring the plaintiff, and not for the purpose of obtaining the water for his own use, the defendant was liable in that action. In that case, the verdict was for the defendant, and the plaintiff was the excepting party. The plaintiff could not complain of that part of the charge; and, in bank,^c there was no occasion to review that part of it; and it is no point in the decision, though Judge PUTNAM does remark, in the course of his opinion, that "the rights of the defendant should not be exercised from mere malice as the judge ruled below," but no such point was in judgment. The exceptions came from the plaintiff, and it can only be regarded as an *obiter dictum* of the judge; the case found, that the defendant had dug his well in that place on his land, where it was most convenient for him; and we think, as applied to a case like the one then at bar, and the one now before us, the position was unsound, and against principle and authority. 1

Judgment of the county court reversed, and the cause remanded.

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RUSSELL T. NOYES v. JOHN SMITH AND WILLIAM R. LEE.

Master and servant.

A master is bound to exercise proper care and diligence in the selection of the agencies and instruments with or upon which he employs his servant; and, if he fail to do so, he will be liable to the servant for any injuries he may sustain therefrom.

The declaration averred that the plaintiff was hired by the defendants to have the charge of, and conduct and run an engine, and that by virtue of said employment, it became the duty of the defendants to furnish an engine that was well constructed and safe, &c., but that they carelessly and wrongfully furnished an insufficient engine; that the insufficiency was unknown to the plaintiff, and "but for want of all proper care and diligence would have been known to the defendants;" and that, while the plaintiff was in the careful and prudent use of said engine, it exploded on account of said insufficiency, and injured the plaintiff, &c. Held, on demurrer, that the declaration disclosed a sufficient cause of action.

ACTION ON THE CASE. The declaration was as follows.

"In a plea of the case, whereupon the plaintiff declares and says, that heretofore, to wit, on the 11th day of November, 1853, and for a long time before that time, the defendants were in the possession of the Vermont Central Railroad Company's track, and of all engines, locomotives, cars, and other furniture, which had previously belonged to the Vermont Central Railroad Company, a corporation chartered and organized by and under a law of the legislature of the state of Vermont, and the defendants on that day, and long before, were and had been common carriers of freight and passengers on said road; and that on the 11th day of November, 1853, the plaintiff was in the employ of the defendants, hired by them, as an engineer, to have charge of and conduct and run an engine on said road, for the purpose of transporting passengers and freight on said road, and had for a long time before been such hired servant of the defendants, in the capacity of engineer,—and that by virtue of said employment of the plaintiff by the defendants, as aforesaid, it became and was the duty of said defendants to furnish an engine for the plaintiff to conduct and run, as it was his duty to do, that was well constructed and safe to the engineer, with the use of proper skill on his part. Yet the defendants, disregarding this duty, to wit, on the 11th day of November, 1853, carelessly and wrongfully gave to the plaintiff to use and conduct in drawing freight on said road, an engine which had not before been con-

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ducted by or known to the plaintiff, which was insufficiently stayed and bolted around the fire box, and insufficient in divers parts; insomuch that it greatly endangered the life of the engineer who ran it,—all which was unknown to the plaintiff, and all which, but for want of all proper care and diligence, would have been known to the defendants. And the plaintiff avers that while in the careful and prudent use and management of said engine, on his part, on the 11th day of November, 1853, on said road, said engine exploded from the imperfection and insufficiency aforesaid, and by the explosion, the plaintiff was so torn and scalded, that he hitherto, since that day, hath been and always will be a cripple, and wholly unable to work, and hath been put to great expense for doctors and nurses, to wit, \$1,000, whereby and by reason of all which, an action hath accrued to the plaintiff to have and recover his said damages, and all he hath lost from the causes aforesaid, to his damage," &c.

To this declaration the defendants demurred, and the county court, September Term, 1855,—POLAND, J., presiding,—adjudged the declaration insufficient. Exceptions by the plaintiff.

P. Dillingham and H. Carpenter for the plaintiff.

This declaration does not present the same question that is decided in *Priestly v. Fowler*, 3 Mees. & Welsb. 1; *Farwell v. B. & W. R. Co.*, 4 Met. 44; *Maury v. So. Car. R. Co.*, 1 McMullan 385. These and many other similar cases determine merely that one servant cannot recover against his employer for injuries occasioned by the negligence of his co-servant, for the reason that all obligation from the master arises, expressly or by implication, from the contract.

We insist that there was, by virtue of this contract of hiring between these parties, an implied warranty that the defendants would furnish the plaintiff with an engine to conduct that was reasonably safe and well constructed; and that, failing to do this, they were liable to the plaintiff for his injuries sustained by reason of that neglect.

It is a legal inference, arising from the contract of hiring, that the master or employer shall employ, as other servants, men reasonably skilled in their particular business, and such as have no

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known bad habits, such as intoxication, and the like. 5 Exch. 354; 6 Barber 231; 1 Amer. L. C. 620, 3 Ed.; 10 Mees. & Welsb. 109; 12 Adolph. & Ellis 737.

Peck & Colby for the defendants.

The question here presented has been *discussed* and the right of action *denied*, in cases where the subject came *collaterally* before the court. This was so in *Ryan v. Cumberland Valley R. Co.*, Penn. Sup. Ct. 1854; Liv. L. J., Apr. 1855. And our courts have repeatedly, as in that case, held employers exempt from liability for injuries occasioned to one servant by the carelessness of another servant, that being a *risk* voluntarily incurred as an incident to the employment. *Hager v. West. R. Co.*, 3 Cush. 270; *Farwell v. Boston & Worcester R. Co.*, 4 Met. 49; 6 Barbour 231; 15 Barbour 574; *Brown v. Maxwell*, 6 Hill 592; *Albro v. Agawam Canal Co.*, 6 Cush. 75. And the same principle will defeat the plaintiff's action here, for if the master is liable for having a defective machine in his service, it would seem he *should* be liable for having a careless or incompetent servant.

But in England the question has been twice decided. *Priestly v. Fowler*, 3 Mees. & Welsb. 1; *Couch v. Steele*, 24 Eng. L. & Eq. 77.

The opinion of the court was delivered, at the circuit session in September, 1856, by

ISHAM, J. This case comes before the court on a general demurrer to the declaration. The plaintiff, it is averred, was injured by the explosion of a locomotive engine, on which he was employed by the defendants, as engineer. It is admitted that the engine was insufficiently stayed or bolted around the fire box, and that it was also insufficient and unsafe in other respects, but that both parties were ignorant of those defects, and had no notice in fact that it was in an unsafe or insecure condition. That fact is directly averred in relation to the plaintiff, and the defendants are not charged with any such notice by any averment in the declaration. It is averred, however, that these defects would have been known to the defendants, but for the want of all proper care and diligence on their part. The inquiry arises, whether the facts stated are sufficient to

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enable the plaintiff to recover; it being admitted that the plaintiff was in the exercise of proper skill and diligence when he was injured.

The general rule seems to be well settled by the authorities, that there is nothing growing out of the mere relation of master and servant that raises the duty stated in the declaration. When there is *no actual notice of defects* in an engine of that character, and *no personal blame* exists on the part of the master, there is no implied obligation or contract on his part that the engine is free from defects, or that it can safely be used by the servant. The law imposes no such obligation. There are risks and dangers incident to most employments, and, especially is this true, in relation to such services as those in which the plaintiff was engaged. Those risks the parties have in view when engagements for services are made, and in consideration of which the rate of compensation is fixed. In all engagements of that character, the servant assumes those risks which are incident to his service, and, as between himself and his master, he is supposed to have contracted on those terms. If an injury is sustained by the servant, in that service, it is regarded as an accident, a mere casualty, and the misfortune must rest on him. That is the doctrine, and the extent of the cases, to which we were referred by the defendant's counsel. In the case of *Priestly v. Fowler*, 3 Mees. & Welsb. 1, it was held that the master was not liable to his servant for an injury sustained by him, from the breaking down of an overloaded van. Lord Abinger in that case observed, that "from the mere relation of master and servant no contract, and therefore no duty, can be implied on the part of the master to cause the servant to be safely and securely carried, or to make the master liable for damage to the servant, arising from any vice or imperfection unknown to the master, in the carriage or in the mode of conducting or loading it." The same doctrine is sustained in *Seymour v. Madox*, 5 Eng. L. & Eq. 265, and in the case of *Couch v. Steel*, 24 Eng. L. & Eq. 77. The principle, which is now well settled in England and this country, "that a master is not liable to his servant for an injury occasioned by the negligence of a fellow servant, in the course of their common employment," is founded upon the same reason. The liability of one servant to be injured by the carelessness of another, is

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a risk which the servant has assumed, as an incident to his employment, and for which the master is not responsible. This general rule, however, has no application to either of those cases when there has been *actual fault or negligence* on the part of the master, either *in the act from which the injury arose, or in the selection and employment of the agent which caused the injury*. The case of *Couch v. Steel*, above cited, recognizes both the general rule and that qualification. In that case it was held, that, as there was no *actual knowledge* of the defective condition of the ship, and *no personal blame* was imputed to the owner, a seaman could sustain no action for an injury sustained in consequence of its unsafe condition. The language of the court implies, that, had there been *actual knowledge or if personal blame* had otherwise been imputed to the ship-owner, a liability would have existed. The case of *Hutchinson v. Railway Company*, 5 Wels., Hurls & Gord. 352, is a strong illustration of the principle. In that case, Alderson, B., after recognizing the general rule, that a master is not, in general, responsible to one servant for an injury occasioned to him by the negligence of a fellow servant, observed, that "this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. The servant," he observed, "when he engages to run the risks of his service, including those arising from the negligence of fellow servants, has a right to understand that the master has taken reasonable care to protect him from such risks, by associating him only with persons of ordinary skill and care." There can be no doubt in relation to the doctrine of those cases, or the general principles on which they are founded. The master, in relation to fellow servants, is bound to exercise diligence and care that he brings into his service only such as are capable, safe and trust-worthy, and for any neglect in exercising that diligence he is liable to his servant for injuries sustained from that neglect. It is not necessary that he should know that they are unsafe and incapable. It is sufficient that he would have known it, if he had exercised reasonable care and diligence. The same doctrine is sustained in this country. 1 Am. L. C. 620; 5 Wels., Hurls & Gord. 357, note; *Coon v. U. & S. Railroad Co.*, 6 Barber 281. There is no distinction in principle between those cases and the one under consideration. Upon the facts admitted

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by this demurrer, whatever may be the agent which the master brings into his service, whether animate or inanimate, the master is bound to exercise care and prudence that those in his employment be not exposed to unreasonable risks and dangers;—and the servant has a right to understand that the master will exercise that diligence in protecting him from injury, and also in selecting the agent from which it may arise. It is only such injuries as have arisen after the exercise of that diligence and care on the part of the master, that can properly be termed accidents or casualties, which the servant has impliedly agreed to risk, and for which the master is not liable. The doctrine is not controverted, that the defendants would be liable to the plaintiff for the injury he has sustained, if they had had notice in fact of the defective condition of the engine. It was so expressly decided in the case of *Keegan v. Western Railroad Corporation*, 4 Selden 175. There is no propriety, therefore, in saying that the defendants may be relieved from that liability by a want of such knowledge, when it has arisen from their gross neglect: for the neglect is gross, when the fact is, as is admitted by the demurrer, that *but for the want of all proper care and diligence, the unsafe condition of the engine would have been known to them*. We think, upon the facts admitted by the demurrer, the plaintiff can sustain this action, and that the declaration is sufficient.

The judgment of the county court must be reversed, and judgment rendered for the plaintiff.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT.

FOR THE

COUNTY OF CHITTENDEN,

AT THE

DECEMBER TERM, 1855;

AND AT THE

CIRCUIT SESSION IN SEPTEMBER, 1856.

PRESENT,

HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

JOSEPH WHIPPLE AND RANSOM JONES v. WILLIAM P. BRIGGS.

Principal and surety.

A joint action may be maintained by two several sureties, against their principal, if the demand upon which they were sureties was taken up or discharged by their joint note, or with the money obtained upon such a note.

Where such a joint right of action exists, money received by either surety upon securities given to indemnify him for his liability for the principal, will enure to the equal benefit of his co-surety, and be, *pro tanto*, a satisfaction of their claim against the principal.

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ASSUMPSIT for money paid. Plea, the general issue; trial by jury, September Term, 1853,—PECK, J., presiding.

The plaintiffs were severally sureties for the defendant upon two notes for \$500 each, one payable to the Bank of Montpelier and the other to the Farmers and Mechanics' Bank in Burlington. One half of the note to the Bank of Montpelier was paid by the defendant at its maturity, and, some time after, a note for \$400, signed by the plaintiffs and one Rolla Gleason, as surety, was discounted at said bank, and with it the other half of the note was paid and the note taken up. The \$400 note was, at its maturity, paid in money by Whipple, and the cashier, by whom the payment was proved, testified that he had no knowledge of any of this money being furnished by Jones. At the maturity of the other \$500 note, on the 19th of June, 1852, a note for \$500, signed by the plaintiffs, and also by Rolla Gleason, as surety, was delivered by Jones to the Farmers and Mechanics' Bank, and received by said bank; and the evidence of the cashier tended to show that this note was received in payment of the defendant's note, upon which the plaintiffs were severally sureties, or that it was discounted by the bank and the proceeds applied in payment of the defendant's note; it also tended to show that the note of June 19, 1852, was treated in the books of the bank as the note of Jones, he being the first signer and the person who asked the discount; and that it was of common occurrence that men frequently signed notes to that bank without adding surety to their names who were really sureties to the same. The evidence of the cashier also tended to show that Jones paid the note at maturity. The plaintiffs claimed, from this evidence, that they were entitled to recover the amount of the note to the Farmers and Mechanics' Bank, and the half of the note to the Bank of Montpelier, making about \$750, exclusive of interest, and also the interest.

It appeared that soon after the attachment of his property on the 22d of September, 1851, the defendant gave the plaintiff Jones, to secure him for liabilities incurred by him for the defendant, a deed of all his lands in the town of Worcester, being about two thousand acres, of which said Jones had sold seven hundred acres for the sum of \$1,400 cash, which he received.

The plaintiffs then read in evidence a note signed by the defend-

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ant, as principal, and by the plaintiffs as sureties, to John Morse, for \$175, and a note for nearly \$500 to the town of Richmond, signed by the defendant, as principal, and the said Jones as surety, upon both which notes, it appeared, suits had been brought, and the defendant Briggs' property attached, which suits were still pending.

There was no evidence tending to prove, nor was it claimed that Jones had paid anything for Briggs, either before or since his receipt of the \$1,400, excepting what he might have paid upon the bank notes in question, \$30 upon the Morse note and \$50 to Briggs, after the receipt of the \$1,400.

The defendant requested the court to charge the jury that there was no evidence in the case of any contract, express or implied, by the defendant to plaintiffs jointly to pay this claim, or any portion of it; and he also insisted that, if Jones had money in his hands belonging to the defendant, he should have applied it on these debts, not only to pay his part of the suretyship, but Whipple's also, unless he could show that he had other individual claims or liabilities on which, in equity, it ought to apply.

The court refused to charge the jury as requested, but charged them, among other things that, in order to maintain this action, it was necessary for the plaintiffs to prove an indebtedness or liability of the defendant to the plaintiffs jointly;—that these notes, being signed by each of the plaintiffs severally and individually, and not jointly as partners or in an associate joint capacity, created no obligation on the defendant to the plaintiffs jointly to indemnify them against the notes, or to repay to them jointly what they might be compelled to pay, but only created an obligation on the defendant to each of the plaintiffs severally and individually, and that the plaintiffs in this suit, by showing that they signed the notes, as surety for Briggs, in the manner indicated by the notes, and showing merely that they had been compelled to pay and had paid them, would not be entitled to recover in this joint action; but that if the plaintiffs signed the notes as sureties for the defendant, and the jury found it proved not only that the plaintiffs paid them, but also that such payments were made out of funds belonging to the plaintiffs jointly, that is, funds which were, at the time of such payment, the joint property of the two plaintiffs, the plaintiffs could, so far as this point is concerned, recover in this joint action the amount

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so paid; and that, if the plaintiffs executed the notes signed by them, and Gleason, as their surety, and they (Jones and Whipple) were really as between themselves both principals in those notes, and they were executed with the understanding between them (Jones and Whipple) that each should pay his half of them, and they were so executed for the purpose of being used in payment of the original notes signed by the plaintiffs and Briggs, or to raise money to make such payments, and were delivered to and received by the banks, in payment of said original notes signed by Briggs and the plaintiffs, or were discounted by the banks and the proceeds of such discount applied in payment of the notes signed by Briggs and the plaintiffs, without any division of the money between the plaintiffs, it would be such a joint payment as would entitle the plaintiffs to recover in this joint action, notwithstanding Jones may have paid one of the new notes and Whipple the other.

The court charged the jury that if the Worcester lands were conveyed to Jones to secure him for his liabilities for Briggs, including the two bank notes in question, then, inasmuch as Jones had converted such security into money to an amount greater than the amount he had paid, and, as the parties had neither of them made any application of such funds to any particular debt or liability, the money so received by Jones must be applied on his (Jones) liabilities for Briggs, which Jones had paid, rather than on his liabilities for Briggs which were still outstanding and unpaid, and that the money so received by Jones would operate as a satisfaction of one half the amount the plaintiffs claimed to recover, but that it would be no bar to a recovery in this action of the other half, which the plaintiffs might recover for the benefit of Whipple, if the jury found the other point made out, that is, that the payment, when made, was a joint payment; and that, if the payment by the plaintiffs, when made, was such a joint payment as would sustain this joint action, the fact that Jones had since received money out of the securities of which he was bound to apply sufficient to satisfy his half of the sum claimed by the plaintiffs in this suit, would not bar a recovery to the amount of the other half, nor would it bar such recovery even if Jones had received and still held in his hands moneys received from such securities sufficient to pay all his liabilities for Briggs, and all he had paid for Briggs,

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together with the whole amount the plaintiffs claimed to have paid on the two bank notes signed by them.

The jury returned a verdict for the plaintiffs for one half the amount which they claimed to recover. The defendant excepted to the refusal of the court to charge as requested, and to that portion of the charge above given.

W. P. Briggs, pro se.

There was no evidence in the case to warrant the charge, and it was therefore erroneous to tell the jury that if they found from the evidence that the notes were paid out of a joint fund, then the plaintiffs could recover, when there was no such evidence in the case. Whether the exchange of notes with Gleason's name on them was payment for the notes given by Briggs, was a question of law, and not of fact. 3 Vt. 236; *Brackett v. Waite*, 6 Vt. 411; 13 Vt. 370.

If there was any joint indebtedness from the defendant to the plaintiffs, then most clearly the payment to Jones of the \$1,400 was a payment to both; if there was no joint claim, why then the suit fails.

J. Mueck and W. W. Peck for the plaintiffs.

The plaintiffs' right of action accrued on giving their own notes to the bank and taking up the notes they had signed for Briggs. *Irley v. Jewett*, 2 Met. 173; *Maneely v. McGee*, 6 Mass. 143; *Thatcher v. Dinsmore*, 5 Mass. 299; *Cornwall v. Gould*, 4 Pick. 444.

This right of action accrued to them jointly. *Osborne v. Harper*, 5 East 225; *Chandler v. Brainard*, 14 Pick. 283; *Doremus v. Selden*, 19 John. 213; *Doolittle v. Dwight*, 2 Met. 561. 5/

Though the plaintiff Jones may be Briggs' debtor, it does not defeat this action. If, in truth, Jones has sufficient of the defendant's money in his hands to pay all the liabilities he is under for him, and the whole of this debt also, Whipple might also maintain an action against Jones at the same time. If the defendant is correct, then if Jones is insolvent, Whipple must lose his debt.

It is at the election of the party who holds several securities for the same debt to prosecute them all at the same time or not. *Stevens v. Briggs*, 14 Vt. 44.

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The opinion of the court was delivered by

BENNETT, J. We think this joint action is well brought. The jury have found that the old notes which the plaintiffs had signed with the defendant, as his surety, had been paid by the new notes which the plaintiffs gave, signed also by Gleason as their surety. It is a common principle that, if two joint sureties pay the note of their principal out of their separate funds, each one has only a right of action for what he has paid; but if the payment is made out of their joint funds, they have a joint action against their principal. In the case cited from the 5th of East, a part of the money was paid on the joint credit of the two sureties, and a part of the money had been raised upon their joint note, and it was held that a joint action was well brought. This seems to be well settled law. See 14 Pick. 283; 19 John. 213; 2 Met. 561.

The difficulty arises on the other part of the plaintiffs' case. The exceptions show that after the plaintiffs had paid the two notes, Jones received from the avails of real estate sold by him, and which had been conveyed to him by Briggs to indemnify him for liabilities incurred, the sum of fourteen hundred dollars; and that Jones still holds this money in his hands, except about the sum of eighty dollars; and it does not appear that Jones has paid at any time, for the use of Briggs, any moneys except the sum of seven hundred and fifty dollars to take up the notes of Briggs to the banks, and the eighty dollars paid to Mr. Briggs himself. As the case now stands, the plaintiffs cannot recover. When Jones took the security from Briggs, it enured also for the benefit of his co-surety, Whipple, in equity; and, if the sureties had paid the bank notes which they had signed for Briggs, out of their separate funds, this would not have affected Whipple's right to have claimed a benefit, in common with Jones, in the security, in chancery. The case cited from the 8th Iredell 286, is in point: see also p. 56 in same volume. But in this case the plaintiffs show a joint right of action against Briggs for the seven hundred and fifty dollars, and in such a case a release by one would operate as a release by both, and a payment to one would be a payment to both. As Jones holds the security, upon the facts that now appear, for the common benefit of himself and Whipple, we think the defendant may insist upon an application of so much of the money raised from the sale

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of his lands in the hands of Jones as will be necessary to discharge the joint right of action of the plaintiffs against him. This, common justice requires, and Jones does not set up a claim to make an application of the money upon any other demands against Briggs.

If the plaintiffs had been entitled to recover at all, we do not see why the recovery should not have been for the whole, and not for a moiety of the sum paid, to which the county court limited the recovery.

Judgment reversed and case remanded.

JOSEPH M. BISHOP, JOHN BRADLEY, THOMAS H. CANFIELD,
AND JOHN SMITH v. GEORGE G. CATLIN AND H. V. HORTON,
trustees of MOSES L. HART AND GEORGE HART.

General and void assignments. Rights and liabilities of the assignee under the trustee process.

An assignment by a firm, for the benefit of their creditors, of all their right and title in certain specified real and personal property and a conveyance, at the same time, by one of the partners, for the same general object, of several parcels of land previously held by him, accompanied by an immediate suspension of the business of the firm, which is thereafter carried on by the assignees, will afford, in the absence of any showing to the contrary, a sufficient presumption that the assignment was of a sufficient amount of the assignor's property as to render it, in that respect, a general assignment.

If an assignment is void under our statute on account of its being a general assignment in trust for the benefit of creditors, the assignee should be allowed the amount of the assignor's indebtedness to him, and the expenses to which he has been subjected in taking care of, and selling the property, and a reasonable compensation for his services, before being made liable as the trustee of the assignor.

If the creditor of the assignor in such an assignment, instead of directly attaching the property, seeks to charge the assignee as the assignor's trustee, he thereby ratifies the assignment and any disposition of the property which the assignee has made in pursuance of it.

Under such an assignment the assignee should not be adjudged the trustee of the assignor on account of any money received by him on the sale of real estate, which was included in the assignment, the title to which may be defeated by an attachment of it by other creditors of the assignor.

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TRUSTEE PROCESS. It appeared from the disclosure of the trustees, and their answers to the interrogatories filed by the plaintiffs, that the principal defendants had made an assignment of their property to the trustees who were their creditors and holden for them as sureties and endorsers. The assignment was for the benefit of, and preferred other creditors as well as the trustees. The assignees took possession of the property assigned and had converted a part of it into money. It was claimed by the plaintiffs that the assignment was void and that the trustees were chargeable for the property and money which they had received under it. The county court, May Term, 1854,—POLAND, J., presiding,—decided that the assignment was invalid and that the trustees were chargeable for the property received by them under it to the amount of the plaintiffs' judgment against the principal defendants. Exceptions by the trustees. The nature of the assignment and of the claims of the trustees under it, and the other facts stated in the disclosure and answers, sufficiently appear in the opinion of the court, which after argument by

L. E. Chittenden, for the trustees; and by

W. W. Peck and *E. Harvey*, for the plaintiffs,

was delivered by

ISHAM, J. It is not pretended that the trustees are chargeable in this case, unless a liability is created under an assignment of property to them by the Messrs. Harts, on the 23d of September, 1852. The property transferred to them consisted of real and personal estate, and was to be disposed of, by them, for the payment of their debts, and debts due to other creditors mentioned in the assignment. If that assignment is valid, the trustees should be discharged, as it appears from their disclosure, that the property is insufficient to pay the debts for which it was transferred to them. But if the assignment is void, either at common law or by statute, the trustees are chargeable under this process, and the property assigned to them must be treated as goods and effects in their hands belonging to the principal debtor. The Comp. Stat. 262, § 46, contains express provisions to that effect. In looking at this assign-

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ment, we think it must be treated as void, under the law of this state, and that it cannot be held by the trustees for all the purposes mentioned in the assignment. It is not deemed necessary to decide the question, whether the assignment contains provisions which would render it void at common law, for whether it contains any such provisions or not, we are satisfied that it is void under the statute of 1843 *which declares all general assignments void*. In the first place the assignment is general in relation to the property assigned. It purports to transfer all the right and interest of Moses L. and George Hart as partners in the property mentioned in the schedule consisting of real and personal estate. A deed of several parcels of real estate was also executed by Moses L. Hart in his individual capacity; and, as it was executed at the same time, and for the same general object, it should be treated as part of the same transaction. Those transfers, in connection with the fact, that the business, in which they were engaged, was immediately suspended, and was afterwards conducted by the trustees, raises the presumption that the assignment embraced so much of their property at least, as to render it, in that particular, a general assignment, and is sufficient to cast the burden of proof on the trustees to show it otherwise. In the second place, it was an assignment in trust. The trustees were to dispose of the property, and apply its avails in payment of their own debts, and of other preferred creditors; and also for general creditors, whose debts were to be paid *pro rata*. These circumstances determine the character of the assignment, and bring the case within those principles which have been frequently decided in this state, and which render the transfer void, under the act, as a general assignment.

Treating that assignment as inoperative for the purposes for which it was made, the important questions in the case arise, as to the extent of the liabilities of the trustees on their disclosure. The trustees have received a considerable sum of money from the sale of personal property, and much remains uncollected. They have also received money for rents, boarding, and on the sale of real estate. The county court ruled that the assignment was invalid, and that the trustees were liable for the property received by them under the assignment to the amount of the plaintiff's judgment. That ruling, we think, cannot be sustained under the provisions of

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our statute. Though the assignment may be invalid, and the property may far exceed the amount of the plaintiffs' judgment against the principal defendants, it does not follow that the trustees are liable to that extent. The statute, 262, § 46, provides, that if any person is summoned as trustee, and shall have in his possession any goods, effects or credits of the principal defendant, which he holds by a conveyance or title that is void as to the creditors of the defendant, he may be adjudged a trustee, although the principal defendant could sustain no action against him for it. By the 51st section it is provided, that "every trustee shall be allowed to retain or deduct out of the goods, effects, and credits in his hands, all his demands founded on contract, express or implied, against the principal defendant, and shall be liable for the balance only, after all such demands between him and the principal defendant are adjusted." This provision of the statute is express. It is only for the balance found due, after such an adjustment, for which the trustees are liable, and not the amount of the property. That balance may exceed the amount of the judgment, and it may fall short of it; and indeed, the right of the trustees to retain from the effects in their hands may be so large as to exceed the value of the property transferred to them. In that event the court would be bound to discharge the trustees from all liability whatever. Before the trustees could have been held chargeable in this case, that balance should have been ascertained and determined. That not having been done, the case must necessarily be remanded for that purpose. As the case now stands, no final disposition of it can be made in this court.

In ascertaining that balance, we think, as the facts now appear in the case, that the trustees are not chargeable for the money received on the sale of the real estate. So far as these plaintiffs are concerned, the commencement of this suit will probably prevent them from levying their execution against the principal defendants on the real estate included in that assignment. It was competent for the plaintiffs, in the first place, to treat the assignment as void and proceed at once by an attachment of the property, and hold the same independent of that assignment or of any right of the assignees to it; or they could have treated the assignment as operative and valid, and charge the assignees as trustees under this

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process. By instituting this suit to recover the avails of the property assigned and therein charging them as trustees under the assignment, they have not only ratified the assignment itself, but also any disposition of the property which may have been made by the trustees under it. The plaintiffs will not be at liberty, after that, to question the legality of any transfer of the property which the trustees may have made. But the other creditors, who have attached the real estate, are not so concluded. They are at liberty to take the real estate and defeat the title of the trustees and of their grantees to it. The trustees ought not to be compelled to account to the plaintiffs for this money, so long as the real estate can be taken from them or their grantees by the other creditors; particularly, if the transfer was made under circumstances which render the trustees liable to their grantees.

From the amount which may be found in the hands of the trustees there are various matters, stated in the disclosure, which the trustees may have a right to retain. It appears that the Messrs. Harts were indebted to the trustees and that the trustees were also liable for them as indorsers and as sureties. The particulars in relation to that indebtedness are not stated. Whatever that indebtedness may be, we have no doubt as to the right of the trustees to retain that amount from those effects in their hands. That right is not only given by statute, but such have been the decisions in this state, in the cases of *Godard v. Hapgood*, and *Scofield v. Sanders*, 25 Vt. 351, 181. Whether that right extends to indorsers and sureties who have not paid the debts, or assumed their payment, we are not now called upon to decide. The decisions, as yet, have not been carried to that extent. From the cases to which we were referred in 4 N. H. 469; 12 N. H. 105; 12 Mass. 140, it would seem that this right of the trustees, to retain the amount of their debts, exists independent of the statute, when the assignment is not *fraudulent in fact*. As between the parties, such assignments are good. They were valid and favored at common law; but they are now, in England, regarded as inoperative and void on the ground that such assignments contravene the principles and policy of the general bankrupt act. Those reasons have no existence in this state; and, therefore, independent of the act, such assignments have been sustained. The difficulties which have

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arisen in enforcing the trust, and the liability of such assignments to abuse, is the ground upon which the act proceeds, in declaring them inoperative. As this assignment transferred a good title to this property as between the parties, and as the plaintiffs, in the commencement of this suit, seek to charge the trustees under it, and thereby to that extent affirming it, we see no impropriety, on general principles, in permitting the trustees to retain the amount of their claims. As the amount of those claims have not been ascertained, and no facts in relation to them are stated, we cannot pass upon their validity. The case must be remanded to the county court for those purposes.

The trustees have the right also, as against the plaintiffs, to deduct from the amount in their hands, the expenses of keeping, taking care of, and selling the property, as well as a reasonable compensation for their services. Those were duties devolving upon them to discharge as assignees, and, if they have the right to sell the property for the payment of their debts, they have also the right to pay reasonable charges in the performance of those duties.

The county court having held that, as the assignment was void, the trustees were chargeable to the amount of the plaintiff's judgment, no adjudication has been had upon the various matters which enter into the investigation of the case in ascertaining the balance for which the trustees are chargeable under the statute. It is within the exclusive province of the county court to determine those matters. When the facts in relation to the particular claims are found, and the balance ascertained, the case can then properly be brought into this court.

The judgment must be reversed, and the case remanded.

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ALONZO STEPHENS v. SUMNER S. THOMPSON AND GEORGE FRANKLIN.

Amendment. Partners. Prima facie evidence. Burden of proof. Depositions.

A declaration upon a promissory note may be amended by adding a count upon an account stated. No new cause of action is thereby introduced if a recovery is claimed only upon the original consideration of the note.

If the creditor of a partnership takes the note or bill of exchange of one member only of the firm, in satisfaction of his claim, he thereby discharges the others.

The receipt of a note, "to balance account," is, *prima facie*, a discharge of the account; and imposes the burden of proof upon the opposite party to show it otherwise.

A party is entitled to a reasonable time to attend, by himself and his counsel, the taking of a deposition; and cannot be required to attend to it during term time.

ASSUMPSIT to recover the amount claimed to be due to the plaintiff from the defendants, as partners, and for which amount the plaintiff had, on the 16th of November, 1850, taken the note of the defendant Franklin alone. The defendant Thompson plead the general issue, the defendant Franklin not appearing, or making any defense. The declaration, as originally drawn, counted specially upon the note. Upon a trial at the November Term, 1854, the county court,—PECK, J., presiding,—decided that, upon the testimony introduced which consisted of the note and evidence of its consideration, the plaintiff could not recover against Thompson, upon his declaration, as it then was, but allowed the plaintiff to file a new count, counting upon an account stated. To the decision of the court allowing said amendment, the defendant Thompson excepted.

Upon a trial by jury at the November Term, 1855,—PECK, J., presiding,—the plaintiff read in evidence a promissory note for \$74.95, dated November 16th, 1850, payable to the plaintiff, and signed by the defendant Franklin, accompanied with testimony tending to prove that the note was given for the amount due to the plaintiff upon an account which accrued, wholly or in part, in his favor against both defendants as partners. The plaintiff testified that, in the summer of 1850, Franklin told him to present his bill

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and he would settle it; and that afterwards, at the date of the note, he and Franklin looked over the account and they agreed on the balance at \$74.95; that Franklin, after they had so agreed, wrote the note and signed it, and wrote a receipt, and presented him the note, and asked him to sign the receipt; that he told Franklin he would take the amount they had agreed on, but wanted his pay; that he did not like that note; and that Franklin said it would make no difference, and would be just as well, he would have his pay in a few days, or words to that effect; that he signed the receipt and took the note; the receipt being as follows, "received of George Franklin his note to balance account up to this date."

Thompson offered in evidence the deposition of one David Greeley, to the admission of which the plaintiff objected. It appeared that it was taken during the term, on Saturday evening, at about five o'clock, the trial being on Monday after; and was taken after notice by the justice, (who took it,) to the plaintiff to attend at the taking, which notice was given verbally at 4½ o'clock the same evening. The plaintiff attended at the taking, but had not sufficient or reasonable notice to procure the attendance of his counsel, and he objected to its being taken on that account. The court excluded the deposition, and to their excluding it Thompson excepted.

Thompson requested the court to instruct the jury, that if the note was taken by the plaintiff in payment of the balance found at the time of giving it, the plaintiff was not entitled to recover against Thompson; that the receipt was prima facie evidence that the note was so taken in payment, and the burden of proof was upon the plaintiff to show that it was not so taken. The court declined so to charge; but did charge that the taking of the note, and giving the receipt, were so many circumstances to be weighed by the jury, in connection with the rest of the evidence, in determining whether the note was to be taken in payment or not; that if they should, from all the evidence, find that it was the understanding of the parties that the execution and delivery of the note and receipt, should be in payment, satisfaction or discharge of the account, or that Stevens should look to Franklin alone for pay-

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ment, the plaintiff was not entitled to recover against Thompson. To the refusal of the court to charge as requested, and the charge on this point, Thompson excepted.

Verdict for the plaintiff.

Peck & Harvey and *Underwood & Hard* for the defendant Thompson.

The only claim set forth in the original declaration, not only on its face appeared to be, but, in fact, was against Franklin alone. It was therefore error to permit the filing of a count upon a claim against Thompson and Franklin, because the new count was for a different cause of action.

The receipt of the note "to balance account," was prima facie evidence that the note was accepted in payment and discharge of the account. *Hutchins v. Olcott*, 4 Vt. 549; *Hatcher v. Dinsmore*, 5 Mass. 302; *Chapman v. Durant*, 10 Mass. 47; *Follett v. Steele*, 16 Vt. 30; *Torrey v. Baxter*, 13 Vt. 452.

The deposition of Greeley was improperly rejected. If the party in fact attends, the question of the reasonableness of the notice is thereby settled. The statute only requiring that the notice "shall be given or served so that the party may have a reasonable time to appear and be present." Acts of 1854, p. 4.

L. B. Englesby for the plaintiff.

Whether a note was given and received in payment of a subsisting claim, is a question of fact which, in this case, has been found in the plaintiff's favor. *Follett et al v. Steele*, 16 Vt. 30, and cases cited. *Waydell et al. v. Law*, 5 Hill 448.

The plaintiff was only present at the taking of Greeley's deposition under protest, and is not thereby deprived of any of his legal rights respecting it.

The opinion of the court was delivered by

BENNET, J. The amendment of the declaration was properly allowed by the county court.

The amendment allowed was the insertion of a count upon an account stated, and a note of hand is evidence to support such a count; and if the party, in his proof, is confined to the original con-

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sideration, there can be no objection. This was not introducing any new cause of action.

We think the law is too well settled in this state to admit of debate that if a party agrees to take, and does take a separate negotiable note or bill of exchange of one member of a partnership firm in satisfaction of their joint debt, it is a discharge of the other partners, and this is according to the English cases. See *Thompson v. Percival*, 5 Barn. & Adol. 933, and cases there cited; and such seemed to be the opinion of the court below, although it must be admitted, that the case cited by counsel from the 5th Hill, is opposed to this view. The question then before us is, did Thompson make out a *prima facie* case that Franklin's note was taken and received in satisfaction of the partnership account. The fact that he received the note *to balance accounts* is, *prima facie*, in discharge of the account.

This is the doctrine of the Massachusetts court, and we have followed the Massachusetts cases. See 4 Vt. 549, and 13 Vt. 452.

The jury should have been told that the taking of the note and giving the receipt, in the manner detailed in the bill of exceptions, made a *prima facie* case for the defendant Thompson, and, unless rebutted, their verdict should have been for him, and there was error in the court submitting to the jury so many circumstances, to be weighed by them, in connection with other circumstances. This was not giving the facts their legal effect.

The deposition of Greeley was properly excluded. It is well settled, as a rule of practice in the county courts, that a party cannot be required to attend the taking of a deposition in term time. The party must have reasonable time to attend the taking of a deposition, by himself and counsel, which was not given in this case.

Judgment reversed and case remanded.

Shepherd v. Briggs.

ALANSON B. SHEPHERD v. WILLIAM P. BRIGGS.

Award.

Neither mistake or irregularity of conduct on the part of arbitrators, which does not affect the whole award, is a ground of defense to it, in an action at law.

An award, which is operative as a final and conclusive adjustment of all matters between the parties, is not vitiated by an order requiring them to execute mutual releases.

DEBT ON AN AWARD to recover the sum of \$ 48.75, alleged to have been awarded in favor of the plaintiff, against the defendant, upon a submission entered into between them. Plea, *nil debet*, and notice; trial by the court, March Term, 1855,—PECK, J., presiding.

The plaintiff read in evidence the submission and award declared upon, both of which were under seal. The defendant then offered to show, by the testimony of one of the arbitrators, that the \$ 48.75, awarded to the plaintiff, was made up, in part, of costs in a suit that the plaintiff had commenced against the defendant, which was pending at the time of the hearing before the arbitrators and at the time of the award, which costs the submission provided should be paid by the plaintiff. This testimony, being objected to by the plaintiff, was excluded by the court.

The defendant then offered to show, by the same witness, the same facts, in connection with the fact that the said sum of \$ 48.75 was not the true sum which the arbitrators found due, in the conclusion to which they arrived, before and at the time of writing the award; but that the same was increased by including said costs, by mistake and inadvertence on their part, in reducing the award to writing before publishing it, and that the award, as written, was not what was intended by the arbitrators. This, being objected to by the plaintiff, was excluded by the court.

The defendant then offered to show, by the same witness, that the arbitrators made up said \$ 48.75, in part, by allowing against the defendant claims without any evidence, and solely on what they heard out doors, from the neighbors, in the absence and without the knowledge or consent of the parties. This was objected to and excluded by the court. The defendant insisted that the award was void for the reason that the arbitrators had no authority to

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award mutual releases. The court decided otherwise, and rendered judgment for the plaintiff for the sum awarded. Exceptions by the defendant.

The submission was of "all and all manner of action and actions, cause and causes of actions, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages and demands whatsoever at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed or depending," and the parties agreed "to well and truly stand to, obey and abide, perform, fulfil and keep the award, order, arbitrament, final end and determination" of the arbitrators named. The award, after providing for the payment of the \$48.75, awarded that the parties should, "in due form of law, execute each to the other of them, or to the others use, general releases, sufficient in law," &c.

W. P. Briggs, pro se.

That courts of law have power to set aside awards of arbitrators for corruption or mistake seems to be settled by the following cases:—3 East 18, *Kent v. Elstole, et al*; 1 East 276, *Lowndes v. Lowndes*; 13 East 357, *Wistmore v. Forbes*; 11 Do. 188, *Fisher v. Pimby*. They have a summary mode of setting aside awards in English courts of law, without any special pleading. In Virginia a court of law will set aside an award of corruption, &c.: 6 Randolph 529, *Graham v. Pierce*, 1 U. S. Dig. 219 Sec. 516; and the question has been directly decided in Vt. in Rutland county, in 1823, where the court decided they would set aside an award for the causes which vitiate a verdict, 1 Washburn Dig. 102.

_____ for the plaintiff.

The defendant cannot, in a court of law, avoid the award for anything except what appears on the face of the same. Cald. on Arbit. 407, 408 and note. If he can, he must plead it specially, or, as he has undertaken to do in this case, by notice. What he offered to prove by one of the arbitrators, if true, would go to show that he was corrupt or very partial, and neither can be shown in a court of law; Cald. on Arbit. 407-8, last ed. The arbitrator was not competent to impeach his own conduct and integrity; Cald. on

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Arbit. 219; 2 John. Ch. R. 348-9, *Underhill v. Van Cartlant*. Nor can the defendant show that a mistake was made by the arbitrators; 2 John. 62, *Newell v. Douglass*; 2 Wend. 567, *Efever v. Shaw*, Cald. 221.

The opinion of the court was delivered by

REDFIELD, CH. J. This was an action of debt upon an award of arbitrators. At the trial, the defendant offered evidence that certain costs between the parties, which the award, in terms, provides shall be paid by the parties respectively, were, by mistake and purposely both, included in the award; and also, that the amount awarded against defendant was, in part, made up of claims which were allowed without any evidence, and solely upon what the arbitrators heard out of doors, from the neighbours, in the absence, and without the knowledge of the parties. The two propositions amount to mistake and irregularity of conduct in the arbitrators, both or either of which are sufficient grounds for correcting the award in equity. But neither go to the whole award, and have not ordinarily been regarded as any ground of defense at law. There may be some cases where defenses, somewhat similar, have been allowed at law. But the great current of authority certainly, both English and American, is against such defense at law, unless where the arbitration is under rule of court.

A plea that the arbitrators, from mere mistake, error, and misapprehension of the law, right and justice of the case, allowed interest upon the plaintiff's claim, and denied it upon the defendant's, is no defense. So the defendant cannot plead partiality or improper conduct of the arbitrators. *Williams v. Paschal*, 4 Dallas 284; *Braddish v. Thompson*, 8 East 344. Such proof is not good on a plea of *nil debet* to an action of debt on the award; *Wills v. Mac-carmick* 2 Wills. R. 148. So a plea that the arbitrator denied the party the right to examine witnesses to a point, but heard those of the other party, in his absence, and without his knowledge, is bad-*Shannon v. Wood*, 5 Halsted 7.

But it has been held that a plea that the arbitrators refused to hear a portion of the claims submitted is good in defense, at law, even. *Harkee v. Hugh*, 2 Halsted, 428. This decision is put upon the ground that, if the arbitrators do not award upon all the

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matters submitted, the award is no compliance with the conditions of the bond, and therefore imposes no duty upon the party to perform it. But to such a defense, it is essential that the proof show that the matters not awarded upon were presented to the arbitrator with proper proof.

I think it has generally been considered in courts of law, that all defenses to awards, where the submission and award were in writing and under seal, for matters not apparent upon the papers, must be pursued in equity. And this rule has been considered to rest, as to mistake of the arbitrators and irregularity of conduct by them, upon the same ground that courts have refused to set aside a written contract between parties in a trial at law, upon the alleged grounds that, by mistake, the contract did not read as it was intended to. And, in regard to the conduct of the arbitrators, it has been considered, in some of the cases certainly, that the arbitrators were necessary parties to any proceedings based upon such a charge. Mere mistakes, or irregularity, short of positive corruption, might not require any explanation at the hands of the arbitrators. And it is difficult to perceive how, in any case, they are proper parties to a litigation, in regard to the validity of the award. And I doubt whether, upon principle, any corruption in the arbitrator or judge, unless with the procurement, or privity of the prevailing party, is any defense to an award, in a court of law. And if the corruption of the arbitrator be with the privity of the party, it is fraud, and is equally a defense at law, and in equity, as well as to specialties as simple contracts. But I do not say this is yet determined as to awards. But it is settled, we think, that the testimony offered was no defense, at law, to the action upon the award, and was therefore properly rejected.

The awarding mutual releases is well enough, as, whether executed or not, the award is a bar to all claims, where the submission is of all demands.

Judgment affirmed.

Hall & Bingham v. Lamb et al.

LESTER HALL AND L. G. BINGHAM v. EDWARD LAMB AND
SALEM T. LAMB.

[IN CHANCERY.]

Vacating a decree. Appeal.

The court of chancery may vacate a decree made and enrolled upon, and in consequence of a bill being taken as confessed, so as to permit a defense to the suit upon its merits.

An application for this purpose is addressed to the discretion of the court of chancery, and should not be considered and determined by the supreme court.

If the application is granted, it is only an interlocutory, and not a final order or decree, and no appeal can be taken from it.

APPEAL from an order of the court of chancery.

The orators brought their bill to enjoin the defendants from collecting certain promissory notes signed and endorsed by the orators. The bill was taken as confessed, for want of an answer, and a decree in accordance with the prayer was entered, made up, signed and left with the clerk for record, after which an application was made to the court of chancery to vacate said decree and allow the defendants to file answers and defend the suit upon its merits. Upon this application the court of chancery, March Term, 1855,—PECK, CHANCELLOR,—upon a hearing, ordered that, upon a compliance with certain terms, the decree in the original cause be vacated and taken off the roll, and the defendants have leave to answer the bill, &c. From this order the orators moved for an appeal, and entered the same upon the docket of the supreme court at its present term. The defendants moved to dismiss the appeal, on the ground that the supreme court had no jurisdiction of it.

D. A. Smalley in support of the motion.

Underwood & Hard against the motion.

The opinion of the court was delivered by

ISHAM, J. We entertain no doubt as to the power of the chancellor to vacate such a decree as was made in this case, even after its enrolment, for the purpose of giving the defendants an opportu-

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nity of defending the bill on its merits, when they have been deprived of that defense by mistake, accident, or even negligence. It was so expressly ruled by CH. KENT, in *Beekman v. Peck*, 3 John. Ch. 415, and by CH. WALWORTH, in *Millspaugh v. McBride*, 7 Paige 509, and in *Kemp v. Squire*, 1 Ves. 205. In the case of *Wooster v. Woodhull*, 1 John. Ch. 540, CH. KENT observed, that such applications were addressed to the discretion of the court, and they would be granted or refused upon considerations not at all affecting the merits of the case upon which the original bill was commenced.

The statute, p. 217, § 79, allows an appeal in chancery only from some *final order or decree of the chancellor*: and, not even then, when a final decree is made for non-appearance and neglect to answer the bill, nor on a decree of foreclosure of mortgage, except under a special permission of the court. The intention was, to allow appeals only in cases where the matter in controversy and on which the original bill was brought has been finally determined by the chancellor, so that, on an appeal from that decree, the whole case, on its merits, can be re-examined in this court. No appeal can be taken from any interlocutory order or decree, as that does not determine the merits of the case. The order of the chancellor, from which this appeal was taken, was purely interlocutory. It simply permitted the defendants to file their answer, and opened the case for trial in that court. The case is now pending before the chancellor. This appeal does not remove that case into this court, and, if we were to sustain it, we could only re-examine the question whether the chancellor properly permitted the defendants to file their answer, or whether, for not complying with the rules of practice in that court, the defendants should be precluded from all examination into the merits of their case. That question may or may not depend upon considerations affecting the merits of the original bill. It, in no sense, is a final order or decree in the case. For that reason, and from the fact that the application was addressed purely to the discretion of the chancellor, and should not be considered in this court, we think the appeal must be dismissed.

Bailey v. Warners.

CELINDA E. BAILEY v. LESTER S. WARNER AND AMASA
WARNER.

[IN CHANCERY.]

Equitable interest. Mortgage. Substitution. Contract.

R. sold to L. W. a piece of land, but, by mistake, his deed described an adjoining piece to which he had no title. L. W. took possession of the place designed to have been, and which he supposed was deeded. The oratrix, being a creditor of L. W., attached all his real estate in the town, and subsequently levied upon a portion of the premises so sold, but not deeded. Between the attachment and the levy, A. W. claiming to have an equitable interest in the premises, obtained a quit-claim deed of them from R. Held that the oratrix acquired, by her attachment and levy, an equitable interest in that portion of the premises set off on her execution; and that, the attachment being constructive notice to A. W. of the oratrix's lien, he could not defeat her equitable right by his legal title, unless he had with it a superior equity.

A person who is substituted in place of a mortgagee may, if equity requires it, be limited, and have allowed to him a less extensive right than that to which the mortgagee himself would have been entitled.

A mortgagee cannot be compelled to rely upon a part only of the mortgaged premises, though that part may be adequate security for his claim, but one substituted in his place may be, if equity requires it.

Application of this principle in the present case.

A mere understanding, or parol agreement, that a person making advancements, or incurring a liability, shall be secured therefor upon certain real estate, will be inoperative against a *bona fide* purchaser, or an attaching creditor without notice.

APPEAL from the court of chancery. One Rockwood was the owner of the equity of redemption of a piece of land, in Burlington, mortgaged by Charles Adams, the grantor of Rockwood, to one Gates, which he (Rockwood) bargained and sold to the defendant Lester S. Warner, but, in his deed, the description, instead of commencing at the north-east corner, by mistake commenced at the south-east corner, and described, by giving courses and distances which would have been correct with the north-east corner as the starting point, a piece of land lying wholly south of that owned by him. Neither party knew of the mistake, and the grantee, Lester S. Warner, entered upon the land purchased, and which he supposed was described in his deed, and erected a house thereon, and remained thereafter in the possession and occupancy of it. While so in possession, the oratrix, being a creditor of Lester S. Warner, commenced a suit, and attached all his real estate in the town of

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Burlington, and subsequently obtained a judgment against him, and took out an execution thereon, which she seasonably caused to be levied on an undivided interest in the equity of redemption of the premises so occupied by the debtor, and which was the only real estate which he owned, or was interested in at the time of the attachment. Between the time of the attachment and levy, the defendant Amasa Warner obtained from Rockwood a quit-claim deed to himself of the premises intended to have been described in the deed to Lester S. Warner. The bill alleged that this quit-claim deed was obtained without the payment of any consideration, and for the purpose of depriving the oratrix of the means of enforcing the payment of her claim, &c.; and prayed that the defendants might be decreed to make assurance and legal conveyance to the oratrix of that part of the equity of redemption which had been so set off to her, and for general relief.

The defendants, in their answer, averred that, at the time of the purchase from Rockwood, the premises were encumbered by a mortgage from him to Charles Adams, securing notes, then outstanding and unpaid, to the amount of \$250, and were sold subject to that encumbrance; that, for the purpose of aiding the defendant Lester S. Warner to make said purchase, Abijah Warner agreed to give, and did give, his note to the person who then held the notes from Rockwood to Adams, under an agreement between him and both the defendants that, if Lester should go on and pay said notes, and save Abijah harmless, the premises were to become and be his property; but that he should not alienate or charge them with any incumbrance until said notes were paid, and in case either Abijah or the defendant Amasa should pay said notes, or any part of them, Lester should convey to them the premises for their security; that \$195 of the \$250 was paid, when it became due, by the defendant Amasa, and the remainder by Lester; that, at the time of erecting the house on said premises, the said Lester, being unable himself to raise the necessary money, applied to Amasa and promised, if he would advance money and other articles required in said building, that he would execute to him a deed of the premises to secure him for such advancements as well as for those he had previously made; and that, under this agreement, and for the purpose of aiding Lester in building the house, he

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(Amasa) did make advancements to him to the amount of \$451.52, and that no part of either of said sums of \$195.00, or \$451.52 had ever been repaid; that Amasa called upon Lester for a deed of the premises, to secure said advances, and upon their examining Rockwood's deed, it was first discovered that it did not describe, and that Lester had no title to the premises in question, and that thereupon, for the purpose of furnishing to Amasa the security promised to him, and for no improper or fraudulent purpose, it was agreed that, if the said Amasa could, he should obtain a quit-claim deed of said premises from the said Rockwood to himself, and hold the same for his security, and that thereupon the quit-claim deed was obtained; and the defendant Amasa Warner insisted that he was entitled to hold said premises as security for all of his said advances, &c.

The answers were traversed and testimony taken, and the court of chancery, March Term, 1855,—PECK, CHANCELLOR,—being of the opinion that the original mortgage for \$250, might be regarded in equity as still subsisting in favor of Amasa Warner, to the amount paid by him thereon, and, aided by the deed from Rockwood to him, constitute a lien on the premises, having priority over the oratrix's attachment and levy; yet, as it appeared that the value of that portion of the premises not covered by the levy was sufficient to pay the sums paid by Amasa upon the mortgage, and, being of the opinion that the attachment and levy of the oratrix had priority over the other claims set up by Amasa Warner, decreed that the defendants severally convey by deed to the oratrix that undivided portion of the premises, which were embraced in and covered by her levy, &c.

Appeal by the defendants.

G. F. Edmunds for the oratrix.

An attachment is a lien upon land, of which the debtor is the equitable owner, to the same extent as upon land of which he has the legal title. Comp. Stat. 312, § 19.

The lien of the oratrix was prior to that of Amasa, for the lien of the latter never attached to the land, so as to become operative at all—it was a contract that a lien should be created *in futuro*, and not a present incumbrance.

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But if a lien did exist in favor of Amasa as against Lester, it could have no effect as against the oratrix, who had no notice of it. She stands in the position of a bona fide purchaser, from the equitable owner in possession. *Bigelow v. Topliff*, 25 Vt. 273. *Carter v. Champion*, 8 Conn. 549.

The statutes of registry apply as well to the creation of liens upon equitable as upon legal estates. Comp. Stat. 384, § 7-24. *Parkist v. Alexander*, 1 J. C. R. 394. And the superior diligence of the oratrix in attaching, before any act on the part of Amasa, gives her the best right, inasmuch as the estate of Rockwood in the land was a dry trust. Story Eq. 421-6.

L. E. Chittenden and *D. Roberts* for the defendant.

I. Lester Warner, at the time the attachment was made, had a mere equitable interest in the premises. That interest only was reached by the attachment. His interest was subject to the claims of Amasa. It nowhere appeared of record and was evidenced only by his possession. The oratrix was not misled in making her attachment, by the record, for there was none, nor by the possession, for that was notice of title, according to the terms of that possession. *Pope v. Henry* 24 Vt. 560.

II. Amasa having paid the purchase money on the mortgage, and thereby extinguished that incumbrance, his right to hold the premises as security, to the extent of such payment, was not denied by the court below. This right rests upon a familiar principle of equity. At the time of the purchase Amasa became liable to pay this incumbrance, and, under the agreement then made, afterwards paid it; and the oratrix, in her levy, takes the benefit of such payment. Equity will, in such a case keep the mortgage on foot, for the benefit of the person who has paid the money. *Downer v. Fox*, 20 Vt. 388. *Paine v. Hathaway*, 3 Vt. 212. *Irish v. Clayes*, 10 Vt. 81.

III. The right of Amasa Warner to hold the premises as a security for the labor and material furnished to build the house, rests upon equally strong grounds. These advances went to enhance the value of the property. They were placed there by the legal, at the request of the equitable owner. The oratrix seeks the aid of a court of equity to put her in possession of property which

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those advances have created. Before the court will lend that aid, she must repay them. *Pope v. Henry*, above cited. Story's Eq. Juris., vol. 2, 1236, 1237, 1238, 1239, 799 and notes—note p. 691. *Woods v. Scott*, 14 Vt. 518, *Bright v. Boyd*, 1 Story 478.

The opinion of the court was delivered by

BENNETT, J. The bill seeks a conveyance of certain real estate to the oratrix. No question can arise but what, from the bill and answers, the oratrix has made out an equitable right to relief against Lester S. Warner, and the only question as to Amasa Warner is, which has the superior equity? he or the oratrix? As the legal title was in Rockwood at the time of the service of the plaintiff's attachment, the case is to be tried upon the same principles as it would have been, if the title had still remained in him, and he made a party to the bill. Rockwood held the legal title as against Lester S. Warner, by means of a mistake in his deed to him. No question can be raised but what Rockwood could be compelled to surrender up the legal title to Lester S. Warner, who had the primary equitable title, had it continued to remain in him. The equitable right to an undivided portion of the premises was acquired by the oratrix by her attachment and levy of execution against Lester S. Warner. The attachment was constructive notice to Amasa Warner of the plaintiff's lien upon the property at the time he took his deed from Rockwood. The question then is, had Amasa an equity prior in time to that of the oratrix which he can set up to defeat or override her equity, and which will enable him to hold the legal title, against her, acquired by him subsequent to her attachment. Though it may be true that, in equity, the mortgage which was put upon this property by Lester S. Warner, and which had been paid in part by Amasa, should be kept on foot, so far as was necessary to indemnify Amasa for the sum of money he paid on the mortgage, yet this right, however, is not by force of the contract of mortgage, but arises out of the chancery principles of subrogation, and, consequently, the chancellor might well refuse to make his rights by substitution coextensive with what they would have been if he had been the mortgagee. A mortgagee cannot be compelled to rely upon a portion of his mortgaged premises, though adequate security. To

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compel this, would be to make contracts for the parties, not to enforce them. But whatever rights Amasa had in this case, arising out of his having paid a part of the mortgage, being by the principles of substitution, a court of equity may set up the mortgage, so far as is necessary to protect Amasa in paying what he did under the mortgage, and decline going further, if equity requires it. So far as the residue of Amasa's claim upon the premises is concerned, it is without foundation. It rests in parol, and is within the statute of frauds, and can have no effect against a *bona fide* purchaser, or attaching creditor without notice. Amasa did not make the advancements on the supposition that they were to be attached to the mortgage given to Adams, or upon the faith of the legal title being in Rockwood, but he claims in his answer that he was to have security upon the property direct from Lester S. Warner.

In this opinion, we have gone upon the ground that the answer was responsive to the bill, and have thought it advisable to express an opinion upon the legal effect of the facts stated in the answer, although we may think the answer not responsive to the bill, (a point not decided,) as by this means there can be no occasion to apply to the chancellor, to take testimony upon the traverse of the answer. The chancellor was right in confining Amasa's claim upon the premises under the Adams mortgage, which was but an equitable one, to that portion of the premises not covered by the levy of the oratrix, as they were ample. There is no sufficient reason shown why the oratrix should not have the legal title of that part of the premises which she levied upon conveyed to her.

This result is the decree of the chancellor is affirmed with costs,

Ætna Ins. Co. v. Wires & Peck.

THE ÆTNA INSURANCE COMPANY v. SALMON WIRES AND
WILLIAM H. PECK.

*Corporation. Powers of its officers. Pleading. Extinguishment
of debt. Surety.*

In a suit in favor of a corporation, their corporate existence can be denied only by a special plea; and need not be proved under the general issue.

Seemle. That an officer of a corporation, who is entrusted with the collection of its debts, would be authorized to assign them, without recourse, upon receiving their full amount.

Upon the dissolution of a co-partnership, one of the partners promised to pay a debt due from the firm, but failed to do so. The other partner, for the purpose of having it collected from the one who had promised to pay it, induced his brother to become the purchaser of it, and made an arrangement himself with the creditor by which it was assigned, without recourse, to his brother upon his paying the full amount due upon it. *Held* that the debt was not thereby extinguished, and that a recovery might be had upon it for the benefit of the assignee.

The one to whom the promise was made became thereby, as between himself and his copartner, a mere surety, and if he had himself furnished the money with which the demand was purchased, *quære*, whether the original debt might not have been still kept on foot for his benefit.

ASSUMPSIT for insurance premiums received by the defendants as agents of the plaintiffs. The defendant Wires made no defense; the defendant Peck plead the general issue, upon which a trial was had by the court, March Term, 1855,—PECK, J., presiding,—when the following facts appeared.

The defendants, in June, 1853, were partners and as such were the agents of the plaintiffs, and received in that capacity premiums for the plaintiffs to the amount of \$442.22, which was subject to a deduction of \$22.35 for the defendants' charges as agents, leaving a balance of \$419.22, due to the plaintiffs on the 1st of July, 1853. On the 8th of July, 1853, the defendants dissolved their copartnership, and Peck promised Wires that he would pay the plaintiffs their claim. He paid towards it only the sum of \$87.20, which he remitted September 24, 1853, and in November following, Wires, being desirous to avoid the payment of the claim himself and to have its collection enforced from Peck, applied to his brother, Martin Wires, and requested him to purchase the claim by advancing to the plaintiffs the amount due upon it, and taking an instrument of transfer of it to himself. This the said Martin,

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knowing the facts already stated and the motive of his brother, consented to do, it being understood that the defendant Wires was to make the negotiation with the plaintiffs. A correspondence was commenced for this purpose which resulted in the execution by the secretary of the plaintiffs, on the 30th of November, 1853, of a written assignment of the claim to the said Martin Wires, at his own risk and cost, for which he gave to the plaintiffs his note, payable to the order of, and endorsed by the defendant Wires for the amount then remaining due to the plaintiffs, and this note was paid at its maturity with the funds of Martin Wires, which were transmitted through the hands of the defendant, Wires. The claim thus assigned was, in pursuance of a previous arrangement with Martin Wires, placed by the defendant Wires in an attorney's hand for collection, and soon thereafter the present suit was brought; but the plaintiffs had no knowledge of it until in March, 1855; and they had never authorized it to be brought unless it was by giving the assignment.

The defendant Peck insisted that there was no legal assignment of the debt;—that plaintiffs had received their pay;—that the payment by Martin Wires, and the assignment, though an assignment in form, was, in fact and in law, a payment; that the defendant Wires could not procure an assignment for the purpose of having the debt collected for his benefit, and thus keep the debt subsisting; that the secretary of the plaintiffs had no power to assign the debt, and that there was no proof of the existence of the plaintiffs as a corporation, and for these reasons insisted that the plaintiff could not recover: but the court, upon the facts above detailed, rendered judgment for the plaintiffs for the amount claimed. Exceptions by the defendant Peck.

Peck & Harvey, for the defendant Peck, insisted

1st. That there was no proof of the corporate existence of the plaintiffs. 2d. That, if a corporation, the power of assignment was not incident to their corporate existence;—and, if they could assign, the secretary, as such, could not execute the transfer; and that therefore the suit, having been brought without authority, could not prevail. 3d. That, the promise from Peck to Wires not appearing to have been on consideration, the defendants stood jointly lia-

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ble to the plaintiffs as between themselves, and that any agreement that the debt should be collected of one alone was a fraud upon him and could not be enforced.

Geo. F. Edmunds for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. I. We think it is sufficiently settled in this state that, in a suit in favor of a corporation, upon the plea of the general issue, the plaintiff is not required to adduce proof of the corporate existence; *Boston Type & S. Foundry v. Spooner*, 5 Vt. 93. Such defense should be made by way of plea in abatement or in bar.

II. The right of the secretary to bind the company by an assignment of its dues, without recourse, upon receiving the amount, does not seem very important. If it were, we should be inclined to regard it, as matter of course, in every officer entrusted with the collection of the debts of a company. But if the debt was or was not legally assigned so as to vest an equitable interest in the claim in M. Wires, and nothing more could be effected by any assignment, even under the corporate seal in pursuance of the vote of the company, in either case, it will not affect this suit unless the transaction operated to extinguish the debt. That is not a question in which the defendant Peck is concerned. It is between M. Wires and the company.

III. We think it did not extinguish the debt. The case finds that, upon the dissolution of the partnership of defendants, Mr. Peck promised to pay this debt; and we think we are not bound against the judgment of the court below, and the common mode of transacting such affairs, and the ordinary presumptions arising therefrom, to infer that the promise was without consideration. It was at the time of the dissolution; and if it formed a part of the dissolution it was upon sufficient consideration. And it would be a strange presumption to suppose it did not form one of the steps in the dissolution.

IV. This being so, the defendant Wires is a mere surety as between the defendants; and it was no want of good faith in the defendant Wires to procure a brother to buy the claim, and if done *bona*

Pope, Admr. v. Stacy.

fide, with M. Wire's funds, we do not see any want of good faith in him, or that he can in any fair way be deprived of his beneficial interest in the claim. The transaction, as stated by the bill of exceptions, is in no sense a payment. The cases read by plaintiff's counsel show that, if the money had been defendant Wires', he might still keep the claim on foot, being a virtual surety. This may be true where it is for the interest of the surety to keep the original debt on foot, to preserve liens, &c; but we have no occasion to discuss it further here; *Low v. Blodgett*, 1 Foster 121, is that of a surety, and the claim purchased with his money and assigned to a third person for his benefit; *McIntyre v. Miller* 13 M. & W. 725, is the case of a debtor furnishing the funds to pay up the debts of a joint stock banking company, and assigned to some third party, in trust for the co-debtor. In both these cases, it was held the transactions did not discharge the debts.

Judgment affirmed.

SAMUEL POPE, *administrator upon the estate of* EBENEZER T. ENGLESBY *v.* HENRY B. STACY.

Pleading. Action by administrator.

Where it is obvious, from the writ and declaration, that the plaintiff sues *as administrator*, neither an express averment of the fact, or a conclusion that it is to the damage of the plaintiff "*as administrator*," is necessary.

In such a suit, causes of action which accrued during the life-time of the deceased may be joined with those which have accrued since, if, when recovered, they would all be assets in the administrator's hands.

ASSUMPSIT. The writ was a summons to the defendant "to answer unto Samuel M. Pope, of Burlington aforesaid, administrator upon the estate of Ebenezer T. Englesby, late of Burlington aforesaid deceased, as by said letters of administration ready in court to be produced will more fully appear; in a plea of the case, for that whereas, the defendant at Burlington, on the 10th day of

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February, in the year of our Lord one thousand eight hundred and forty-nine, did make, execute and deliver to said Ebenezer T. Englesby, in his life-time, a certain note in writing, commonly called a promissory note, the date whereof is the same day and year last aforesaid, and thereby promised the said Ebenezer T. Englesby in his life-time, for value received, to pay him, said Englesby, or his order, the sum of two hundred and fifty dollars in one year from the date thereof, with interest. Whereupon the defendant became then and there liable to pay the said Englesby in his life-time the aforesaid sum of money in said note specified, according to the tenor of said note. And the defendant being so liable, as aforesaid, did, in consideration thereof, afterwards, to wit, at Burlington aforesaid, on the 10th day of February, A. D. 1850, assume and faithfully promise to pay to the said Englesby in his life-time the aforesaid sum of money in said note specified, according to the tenor of said note. Yet the defendant not regarding his said promise, has not performed the same, or paid said sum of money, though often thereto requested; but has refused and neglected so to do and still does refuse.

"Also, in a plea of the case, for that the defendant at Burlington aforesaid, on the 10th day of February, A. D. 1850, and in the life-time of said Englesby, was indebted to the said Englesby in the sum of four hundred dollars, for so much money before that time had and received by the defendant to the said Englesby's use; and in the like sum for so much money before that time lent and accommodated by the said Englesby in his life-time to the defendant and at his request; and in the like sum for money, before that time, paid, laid out and expended by the said Englesby in his life-time, to and for the use of the defendant and at his request; and in the like sum for certain work, labor, care and diligence of the said Englesby in his life-time before that time done and performed, and bestowed about the business of the defendant, and for the defendant, and at his request; and for divers materials in and about said work furnished by the said Englesby in his life-time at the defendant's request; and also in the like sum for divers goods, wares and merchandises of the said Englesby in his life-time before that time by said Englesby sold and delivered and bargained and sold to the

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defendant and at his request; and in consideration thereof the defendant then and there promised the said Englesby in his life-time to pay said Englesby in his life-time, and the said Samuel M. Pope, such administrator as aforesaid, since said Englesby's death, the said sums on demand; yet, though often requested, the defendant has not paid the same, but neglects and refuses so to do. All which is to the damage of the plaintiff (as he says) the sum of four hundred dollars, for the recovery of which, with just costs, the plaintiff brings suit."

To this declaration the defendant demurred. The county court, March Term, 1855,—PECK, J., presiding,—decided that the declaration was sufficient, and rendered judgment for the plaintiff; to which the defendant excepted.

T. G. Hill for the defendant.

L. B. Englesby for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. In this case the questions arise upon a demurrer to the declaration. And, first, it is objected, that it is not alleged that the plaintiff sues *as* administrator. The allegation is, that the defendant should answer to the plaintiff, administrator upon the estate, &c.; and, in the second count, that the defendant promised the plaintiff, such administrator as aforesaid. We know that some of the cases have held that such averments are not sufficient to show that the plaintiff sues *as* administrator, and therefore, that counts in this form, not stating the cause of action as arising in the life-time of the intestate, joined with counts where the cause of action did accrue during the life of the intestate, are improperly joined. But this kind of refinement is more ingenious than ingenuous, and, whatever may have been thought of such speculations, at one time, it is now well settled, practically, that no such refinement, in special pleading, shall be regarded as worthy of preservation, and they are, therefore, to be abandoned by courts, so as not to provoke the interference of legislation needlessly. This is certainly one of the most refined in the books and we can-

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not adopt it. This is obviously an action where the plaintiff sues as administrator, and he may, in such action, join causes of action accruing during the life of the intestate and since his decease, if both are assets in the administrator's hands. A conclusion in such a declaration to the damage of the plaintiff is sufficient.

Judgment affirmed.

JAMES NORRIS v. THE VERMONT CENTRAL RAILROAD COMPANY.

Liability of a railroad company in turning a river. Effect of a deed of land to a railroad company.

When a railroad company have rightfully and properly turned a stream of water, they are not obliged thereafter to observe the action of the water and so protect the banks, or take other timely measures, as to prevent the encroachment of it upon neighboring lands.

Where a piece of land was deeded to a railroad company, it is to be presumed that the contingent damages which would have been included in an assessment of the damages, by commissioners, upon a compulsory taking of it, were considered in determining the price which was paid for it. BENNETT, J.

ACTION ON THE CASE to recover for damages to the plaintiff's land, in consequence of the turning of Winooski River by the defendants. The cause was referred, and before the referee it was shown that the plaintiff conveyed to the defendants, on the 19th of June, 1849, a piece of land, described in his deed of that date. At that time the defendants had made the survey and location of their road, and they purchased this piece or parcel of land for the purpose of turning the Winooski River, and thus avoid bridging. The river was turned, and the defendants' railroad constructed.

The plaintiff claimed, and it was proved, that by the operation of the frosts and the current of the river, the southern bank of the new channel had been gradually worn and carried away beyond the southern line of the defendants' purchase; and that he had thus lost a portion of his meadow.

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The plaintiff's meadow along the southerly bank of the river, before it was turned, was well protected by a species of willow which guarded the bank, and, at that time, the current of the river was against the northerly shore, and had been, for several years, making new soil upon that side, and thus increasing the quantity of his land.

The turning of the river did necessarily endanger the plaintiff's meadow, and render it very much exposed to be washed and wasted away by the action of the water, and could not be *fully protected* except at an expense disproportionate to the value of the land, liable to be carried away; but it was shown that the owners of meadow land on that river, in that vicinity, were in the habit, and that it had become the usual custom, when the river encroached upon the bank, to cart in brush and stones, which would afford a partial and sometimes adequate protection, and that, at a moderate expense.

If the law imposed the duty upon the defendants to observe the action of the water, from time to time, upon the plaintiff's meadow, and cast in brush and stone to the extent a prudent proprietor of the land would do to save his own land; or, if the defendants were bound by law to protect the banks so that the river should not encroach upon the plaintiff's land, at whatever cost, in either case, the referee found that the defendants had been guilty of negligence, in omitting a duty which the law imposed upon them; but if otherwise, then the defendants should recover their costs.

The value of the land washed away the referee found to be *one hundred and seven dollars and seventy cents*, to which should be added nineteen dollars and thirty-eight cents interest.

Upon the report of the referee, the county court, March Term, 1855,—PECK, J., presiding,—rendered judgment, *pro forma*, for the plaintiff to recover the value of the land washed away as reported. Exceptions by the defendants.

Roberts & Chittenden for the defendants.

That, upon general principles, the defendants are not liable to the plaintiff's claim, see *Hatch et al. v. Vt. Central R. Co.*, 25 Vt. 49, and opinion of REDFIELD, CH. J., in do. p. 61-65, and in *Whitcomb v. same*, 25 Vt. 68.

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All the statute obligations imposed upon the defendants, were performed by them in the outset.

The conveyance of the land, for the purposes named, should have no less effect against the plaintiff than if taken upon the appraisal of commissioners, under sec. 7 of their charter. *Whitcomb v. Vt. Central R. Co.*, 25 Vt. 70.

If so taken, the commissioners would have estimated these damages, as *likely* to occur.

It was then apparent that the willow hedge would be destroyed, and that the current might be changed from the north to the south shore; and what more *likely* than that the action of frosts and the current, in its new channel, would have worked the mischief complained of.

P. Dillingham for the plaintiff.

By the 10th section of the defendants' act of incorporation, all water courses and streams, turned by said corporation, shall be restored "to their former state and usefulness, as near as practicable." This duty could not be fulfilled by the defendants to this plaintiff, without making the south bank of the new channel as safe to him as the old one was; *certainly not short of using means to do so*, "to the extent a prudent proprietor of the land would do to save his own land." *Whitcomb v. Vt. C. R. Co.*, 25 Vt. 69.

The fact that the defendant purchased the land on which the new channel was dug, gave the defendant no license to do the work differently from what it should have been done, had the easement or right of way been acquired in the mode pointed out in the charter. *Whitcomb v. Vt. C. R. Co.*, 25 Vt. 70.

Independent of the charter, and merely as an adjoining landowner, the defendant would be liable on the facts, as found by the referee; for all the plaintiff's loss was occasioned to the plaintiff from the natural consequences, necessary ones, of the defendant's acts, on his own soil, and for this the plaintiff is entitled to recover. *Thurston v. Hancock*, 12 Mass. 220; *Hays v. Cohoes Co.*, 2 Comstock 159; *Hatch v. Vt. C. R. Co.*, 25 Vt. 65.

The opinion of the court was delivered by

BENNETT, J. In this case the referee was to decide according to law, and, for the facts found by him, his report may be referred to.

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It is not claimed, in the argument, that the act of turning the river, by the defendants, was, in itself, unlawful; and, it is clear, that if the defendants are to be made liable on the ground of *negligence*, or *want of care*, or *skill* in turning the river, by means of which the damage was caused, such a case must be *affirmatively* made out. None is found by the referee, unless the law imposed the duty upon the railroad company to observe the action of the water from time to time, upon the plaintiff's meadow, and to cast in brush and stones, as a prudent man would do to save his own land; or, unless the company were bound, as matter of law, to protect the banks of the river, at all events, so that the stream should not encroach upon the plaintiff's land.

We think no such duty was imposed upon the company. The rights of the defendants, in the construction of their road, were coëxtensive with what they would have been if the plaintiff's land had been taken by compulsory process. It is true, the referee finds that the turning of the river did necessarily endanger the plaintiff's meadow; and, if the land had been taken by compulsory process, the damages which would be likely to accrue from such cause would, or should have been, assessed as a part of the land damages, and it would have been conclusively presumed they were included in the land damages. When the defendants, by agreement, purchased of the plaintiff the land for the use of the company, it is to be presumed that the contingent damages which might arise from the turning of the river, in a prudent and proper manner, were taken into account in fixing the price. It was then the duty of the plaintiff, after the stream had been properly turned, to watch the future action of the water upon his own lands, and to cast in brush and stones, if necessary to the protection of the banks; and the defendants were not required to protect them from the effect of the water at all times. All that would be required of them, was, to use due care in turning the river, and securing the banks in a reasonable manner from the effects of the stream. As no negligence or want of skill in performing this duty is found, the judgment of the county court is reversed, and judgment on the report for the defendants.

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ORVILLE M. CLARK v. THE VERMONT AND CANADA RAILROAD COMPANY.

Railroad company. Fences. Damages arising from negligence in the construction of their road. Liability for acts of the servants of their contractor.

The provision in the charter of the Vt. & Canada R. Co., requiring them to build and maintain fences on each side of their road, requires them to have such fences at least as soon as they commence running their road.

In the construction of their road, the company were bound to exercise the rights conferred upon them with a prudent regard to the rights of others; and if they were guilty of negligence in this respect, whereby a land owner was injured, it is not to be presumed, in the absence of proof, that the damages thus occasioned were taken into consideration by the commissioners in their subsequent appraisal of his land damages. The damages which they were to appraise, were those arising from a construction of the road properly and in a prudent manner:

A person is not liable for injuries occasioned by the acts or neglect of the servants of one who has contracted to do a piece of work for him by the job.

ACTION ON THE CASE to recover for damages sustained by the plaintiff connected with the construction, by the defendants, of their railroad across the plaintiff's farm. Plea, the general issue; trial by jury, March Term, 1855,—PECK, J., presiding.

It appeared on trial that the defendants located their road through the farm of the plaintiff, and commenced work thereupon in October, 1849, and so far completed their road, that cars ran upon it in September, 1850. The damages of the plaintiff in consequence of such location were appraised by commissioners, and the appraisal was appealed from, and the final appraisal by the second board of commissioners was made in July, 1851, and their award of damages paid. The plaintiff claimed to recover in this action for damages done by animals straying upon a field of his of about eight acres, through which the defendants' road passed, and a field of his of about seventy acres adjoining to, and on the west side of the road, during the fall of 1849, and the summer of 1850, in consequence of the land taken by the defendants for their road being unfenced. He also claimed to recover for damages done to about two acres of oats in said field of eight acres, in the same way, after the cars commenced running in the fall of 1850; also for damages done to his crops in a field not adjoining the road, in consequence of bars leading into said field being left down, in the summer of

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1850, by workmen upon the defendants' road. This field and bars were about forty rods from the highway and about the same distance from the defendants' railroad; on the line of the railroad were some temporary shanties occupied by day-laborers who were at work on the railroad, in the employ of men who had taken a job of the defendants for grading their road, and these laborers were in the habit of going through these bars to get water to drink, and for their families, and, while thus engaged on said railroad, on one of these occasions while after water, some of these laborers left the bars down and the plaintiff's cattle entered through the bars and did the damage claimed. The plaintiff also claimed to recover for damages done to his meadow by the workmen upon the defendants road in the winter of 1849 and 1850, in drawing stones with teams across the same and using a small piece of land by the side of said railroad to deposite and dress said stone thereupon. In relation to the stone so drawn, it appeared that the plaintiff gave said workmen, who had taken a job of grading and masonry on the defendants railroad, leave to take said stone from a ledge upon his land but no express license or leave to draw them across his land; but it appeared that it was necessary to do so, and that no unnecessary damage was done. The plaintiff also claimed to recover for certain fence torn down by workmen employed upon the defendants road in the winter of 1849, and 1850, which was outside of the land taken by the defendants, and which was torn down by said workmen in order to make room for a highway, the former highway having been taken for the defendants' road at this point; and also for certain fence covered up in making an embankment upon said road during said winter of 1849 and 1850. The plaintiff also claimed to recover for certain timber taken by an agent of the defendants, and while in the employ of the defendants, and used in the construction of the defendants' road, in erecting a bridge. It appeared that the plaintiff had suffered damages in the respects for which he claimed damage and in the manner claimed by him. The defendants built no fence upon the sides of their road until the 28th day of April, 1851, when they commenced the building of the same and finished it through the plaintiff's farm in the forepart of June, 1851. It also appeared that the defendants might, by building the fence along the sides of their road, have prevented the dam-

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ages done to crops for which the plaintiff claimed to recover in the plaintiff's field of about seventy acres, and also in all of said field of about eight acres except a small portion thereof on the west side of said road, and that said fence to so protect said fields could have been built and maintained without interfering with the construction of said road.

No damage was claimed for injury done by cattle or for want of fences accruing subsequent to the fall of 1850. There was no proof offered on either side to show whether the damages claimed were or were not claimed in the hearing before, or allowed in the award of the commissioners.

The court decided that, as to the claim for the item for the workmen leaving the bars down, the defendants were not liable; and that all of the other items of damages, (except for the timber,) claimed by the plaintiff, might have been appraised by said commissioners, and that the plaintiff could not recover except for said timber, and instructed the jury to return a verdict for the value of said timber only. Exceptions by the plaintiff.

H. B. Smith for the plaintiff.

_____ for the defendants.

The opinion of the court was delivered by

BENNETT, J. There are several grounds upon which the plaintiff seeks to recover beyond what was allowed him in the county court, and we will first consider that class of claims for damages, resting in the neglect or omission of the defendants, in not fencing their road.

The case finds that the defendants located their road through the plaintiff's farm, and commenced working in October, 1849, and that it was so far completed that they commenced running it in September, 1850; and that the defendants caused no fence to be built on their road until the 28th of April, 1851; and that the fence was not finished through the plaintiff's farm until the forepart of June, 1851. The charter of the railroad company requires them "to build and maintain a sufficient fence on each side of their railroad through its whole route, where a fence may be requisite for the owners or occupants of the adjoining land." Though the

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charter prescribes in terms, no limitation as to the time in which the fences should be built, yet one must be fixed as near as may be, by construction.

The railroad act of 1850, made it the duty of all railroad companies, thereafter chartered, to fence their roads by the time they should be completed and in running order; and we think that, under the defendants' charter, it is no more than reasonable to require the defendants to have the fences built, at least, as soon as they shall commence running their road. This, both the policy of the law and the reason of the thing requires; and this is but a reasonable construction of the defendant's charter. If, then, this duty is not performed by the company within the time, they are chargeable with legal negligence.

Though we cannot say, *as matter of law*, that the defendants were bound to erect fences before or while they were constructing their road through any particular land holder's premises, yet we can say, they must exercise their rights with a prudent regard to the rights of others; and if lacking in this duty, they are chargeable with negligence, and must answer for its consequences. What would constitute a prudent regard to the rights of others in one case, might not in another; and each case must rest upon its own peculiar circumstances. No damages were claimed on trial for any injury done by cattle, or for want of fences subsequent to the fall of 1850, but the road was run in September of that year, and not fenced till the last of April, 1851. Damages in this case may have accrued to the plaintiff from a want of a prudent regard to his rights by the defendants; and consequently they may be chargeable with negligence in not fencing their road, even before it was in a running condition. We cannot presume, *as matter of law*, that damages resulting from such negligence, were included in the land damages assessed by the commissioners, although the final assessment of damages was not till the summer of 1851. Such damages, however, as should result to the land-holder from a proper construction of the road in a prudent manner, and with a due regard to the plaintiff's rights, must be deemed to have been taken into account in the assessment of his land damages, and cannot be made the ground of recovery in this action. The commissioners are to assess such damages "as are likely to arise," that is, from a

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proper construction of the road, with a due regard to the rights of others. If, however, it can be shown in this case that damages which had arisen from the negligence of the defendants, in not building the fences in a proper time, were, in fact, included in the final assessment of the land damages, and such damages paid to the plaintiff, it would be a satisfaction of them. If then it is not shown that the damages claimed were in fact included in the land damages, the question of damages should go to the jury under proper instructions, and the right to recover must depend upon the question of negligence in failing to fence the road in a seasonable time, and this must be an open question for the jury, up to the time when, as matter of law, they were bound absolutely to have the road fenced, and an omission to do it after that time, is, in law, negligence.

We think the county court were right in holding that, the defendants were not entitled to recover for the damages occasioned by the workmen on the road, by reason of their leaving the bars down, or from other wrongful acts of the workmen. They were in the employ of men who had taken a job of the railroad company, and were their servants, and not the servants of the company; and we think, at the present day, the law is well settled that, in such a case, you cannot go against the railroad company for the negligence of the servants of the contractors under the company.

There is no ground upon which the plaintiff can claim to recover damages for the injury done his meadow. The case finds, that the plaintiff gave to the workmen who had taken a job on the defendants' railroad leave to take stone from a ledge upon his land; and by implication, a license was also given to the workmen to draw the stone across the plaintiff's land to the railroad, if necessary. The case finds this was necessary, and that no unnecessary damage was done.

As it respects the small piece of land to dress the stone upon, it must be taken that such damages were included in the assessment of damages by the commissioners, provided there was a prudent and proper use of the land for that purpose, and the contrary is not pretended.

The judgment of the county court is reversed, and the cause remanded.

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ANDREW F. HASTINGS, WILLIAM LIBBEY AND WILLIAM
F. FORBEY v. RUSSELL G. HOPKINSON AND GEORGE H.
PAUL.

*Partnership. Limitation of liability of a copartner; by what
law governed, and how proved.*

A provision, in articles of copartnership, that one of the partners is not to be liable for any purchase made by the firm on credit, is valid and operative, and will prevent a recovery against him, on account of such a purchase, if the person of whom it is made is informed, or has knowledge of the provision.

The liability of a partner, and the power of the other members of the firm to bind him, by a purchase of goods on credit in the state of New York, is to be determined by the laws of this state, if the partnership was formed, and its business carried on here.

The provisions and conditions of written articles of copartnership cannot be proved by parol by the copartners themselves who have the original articles in their possession, or under their control. And in this case where the plaintiffs were seeking to charge the defendants as copartners, and had given them notice to produce the written articles, and upon their neglect to do so had introduced depositions of a witness tending to prove such a partnership, it was held that a further deposition of the same witness, taken by the defendants in reference to the contents or provisions of those articles, was inadmissible, either as a cross-examination upon, or as a continuation of the testimony contained in the other depositions.

ASSUMPSIT for goods and money with a specification. Plea, the general issue; trial by jury, March Term, 1855,—PIERPOINT, J., presiding.

No defense was made by Paul, and a verdict was rendered against him for the amount of the plaintiffs' claim and costs. Hopkinson defended. The plaintiffs claimed to recover against the defendants as partners with one S. B. Rockwell, and as having, as such partners, conducted the mercantile business under the firm and style of George H. Paul, and made the purchases and received the cash charged in the plaintiffs' specification, at the city of New York. In support of this claim the plaintiffs introduced two depositions of said Rockwell, one taken April 26th, 1851, the other May 3d, 1851, and other evidence which tended to show that said Rockwell applied to them prior to the commencement of the account, representing to them that the firm was formed between himself and the defendants, and that Hopkinson was worth, at least, \$10,000; and that said representations were made to the plaintiffs

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by Rockwell afterwards, and from time to time, while the account accrued, and as the sales were made; and that the plaintiffs, relying upon these representations, sold to the defendants, and said Rockwell as such partners, the bills of merchandize specified, the purchases being negotiated by Rockwell, and made at the city of New York, where the plaintiffs conducted their business; and that the goods, as sold, were charged to the defendants by the style of their firm, forwarded to Burlington, and there used by the firm in its business.

Hopkinson offered in evidence a deposition of Rockwell, taken on the part of the defense, on the 17th of February, 1853, as a cross-examination of the witness, to the depositions introduced by the plaintiffs. The plaintiffs objected to the admission of those parts of the deposition contained in brackets. When the objection was made, it was admitted by Hopkinson that the plaintiffs had duly notified his counsel to produce, on the trial, the articles of partnership described in the depositions introduced by them. The court overruled the objection, and admitted the deposition, to which the plaintiffs excepted.

The defendants introduced no other evidence, and having rested, the plaintiffs offered in evidence a printed book, purporting to have been published in New York, and to contain the statutes of that state, and among them a statute on the subject of limited partnerships, purporting to have been passed anterior to the commencement of the account, with parol evidence that, when the account commenced, said statute of limited partnership was, and ever since has been, in force in that state. The court excluded this evidence, and the plaintiffs excepted to the exclusion of it.

The plaintiffs requested the court to instruct the jury that, if the facts stated by Rockwell in those parts of his deposition taken for the defense, which the plaintiffs objected to, were true, Hopkinson was liable to the plaintiffs for the account, if the sales and deliveries were made by the plaintiffs relying upon the credit of Hopkinson, as such partner of Rockwell and Paul, and that if they should find that the sales and deliveries were so made, they should return a verdict for the plaintiffs.

The court refused so to charge, but did charge the jury that, if the evidence of Rockwell was true, he and the defendants were partners during the period in question, and their verdict should be

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for the plaintiffs against both defendants, unless the jury found that, at the time the partnership was formed, it was agreed between Paul, Rockwell and Hopkinson that no goods should be purchased in market upon the credit of the partnership, and that Hopkinson was not to be made liable for the purchase of any goods in market; and that the plaintiffs, at the time they sold the goods specified, had full knowledge of this agreement; and if they so found, their verdict should be in favor of Hopkinson. To this charge, and refusal to charge as requested, the plaintiffs also excepted. Verdict for the plaintiffs against Paul alone.

In the depositions taken by the plaintiffs, Rockwell testified that there were written articles of copartnership between, and signed by the defendants Hopkinson and Paul, and himself, in April or May, 1850, by the terms of which each party was to receive one-third of the profits; that Hopkinson was to, and did put \$1000 into the business; that the business was conducted in the name of George H. Paul; that he (Rockwell) as agent of the firm, bought of the plaintiffs, for the firm, the goods specified, &c;

Those parts of the deposition, taken on the part of the defense, which were considered by, and are referred to in the opinion of the supreme court, were as follows, the parts objected to by the plaintiffs being enclosed in brackets.

"I, Silas B. Rockwell, of &c., depose and say: that about the 1st of April, 1850, written articles of agreement were entered into between George H. Paul, Russell G. Hopkinson and myself, [by which it was agreed that Hopkinson should advance to Paul one thousand dollars, for the purpose of enabling him to transact mercantile business in Burlington, Vt., and that Hopkinson should bear one-third of the expense of carrying on said business, including only the incidental expense of carrying on said business, such as rent, wood, lights, and expenses of going to market, and was to receive one-third of the profits of said business; but the said Hopkinson was, by the terms of said contract, not to be liable for any debts which might be contracted in purchasing goods, and at the end of one year from the date of said agreement, Hopkinson was to have the right to take out of the concern the thousand dollars which he so paid in, and if he did so, his interest in the concern was to cease. It was also agreed that the remaining two-

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thirds of the profits of said business, should be equally divided between the said Paul and myself, and that the business should be transacted in the name of Paul.] * * * *

* * * * "The business was carried on in the name of Paul, by me as his agent; I mean the business of the store until Paul's failure.

"Hopkinson was never consulted about the business, and never, to my knowledge, gave any directions as to its management, but, soon after the agreement was made, left Vermont, and did not return before Paul's failure.

"I further say that I made all the purchases of goods in the name of George H. Paul.

"[At the time of making the first purchase of Hastings, Libbey & Forbey, after the making of the contract between Hopkinson, Paul and myself, as above stated, I informed William Hastings, of the firm of H., L. & F., of the arrangement between Hopkinson, Paul and myself, and stated to him that Hopkinson was not to be liable for any of Paul's purchases.]

"I think Hastings then inquired of me if Hopkinson had advertised the fact that he was a select partner, and I informed him that he had not.

"[I had other conversations with the said Hastings, during the spring, summer, and fall of 1850, upon the subject, in which, also, I informed him of all the terms of Hopkinson's connection with Paul.]" * * * *

W. W. Peck and E. Harvey for the plaintiffs.

1. The court erred in refusing to charge as requested, and in charging as it did.

A perception by one, as partner, in the profits of a business, subjects him, as to third persons, to all losses which arise in the course of it, consistently with its terms. Restrictive arrangements between the partners, as to the kind, or extent of losses which they shall share in, do not affect third persons, if known to them. The notice leaves the fact of a perception of the profits remaining, and therefore its legal effect. In this case, H., P. & R. were partners *inter sese*. 3 Kent's Com. 23-30. Story on Part. § 54. *Dobb et al.*

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v. *Halsey*, 16 Johns. 34. *Cheap et al v. Crammond*, 4 B. & Ald. 663. *Everitt v. Chapman*, 6 Conn. *Griffith et al. v. Buffum et al.* 22 Vt. 181. 1 Smith's Lead Cas. 882-834.

A partnership implies power in each member to deal upon its credit. *U. S. v. Winship*, 5 Peters. The provision was a mere agreement by P. & R. to indemnify H. against its exercise.

If this is not the import of the provision, its import is to permit R. & P. to purchase for the business on their joint or several credit; thus admitting H. to the profits which might arise from such purchases, and attempting to exempt him from the debts which should be thus created. It left him a general partner to third persons, with notice. 2 Wm. Black, 998, *Grace v. Smith*. 2 H. Black 235, *Waugh v. Carver*. 4 East. 114, *Herketh v. Blanchard*. 12 East. 421, *Gouthwaite v. Duckworth*. 29 Eng. Law & Eq. 276, *Paul et al. v. Thomas*. 3 M. & W. 357, *Bond v. Pittard*. 5 B. & Ald. 954, *Gilpin v. Enderly*. *South Carolina Bank v. Case*, 1 Smith Lead. Cas. 831, note to *Waugh v. Carver*. 6 Serg. & Rawl. 338, *Gill et al. v. Kuhu*. 15 Johns. 409, *Walden et al. v. Sherburn & Eakin*. 9 Mass. 119, *Sylvester v. Smith*. 6 Conn. 347, *Everitt v. Chapman*. 22 Vt. 181, *Griffith et al. v. Buffum et al.* 9 East. 516, *Rex v. Dodd*. 4 Serg. & Rawl. 356, *Hess et al. v. Westy*. 7 Dana 368, *Shuffleley et al. v. Howard et al.* 3 Kent's Com. 26-34. Story on Part. § 61-63. Collyer on Part. § 6, 78, 99, 80-82. 1 Story C. C. 372, *Hazard v. Hazard*. 7 Ala. 761.

2. The court erred in excluding the evidence offered of the N. Y. Law.

If the matter sworn to by R., in his third deposition, as to the contents of the articles, was admissible, this law was material. The contracts of the purchase were made in New York. If the restriction was legal or effective by the law of the *situs* of the firm, to be effective on a contract made in its business in New York, it must also be effective by the law of that state. The opinion of the court in 25 Vt. 73, *Cutler v. Est. of Thomas*, seems to adopt a different principle. It is submitted that in this particular, the opinion is unsound.

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3. The court erred in admitting the evidence objected to by the plaintiffs.

A party cannot prove the contents of an instrument by parol, without first proving an inability to produce the instrument.

The ruling cannot be justified on the ground that the deposition was a cross-examination. The principle upon which it was admitted, would, when one party is compelled to rely upon the contents of an instrument in the control of another, enable the latter to withhold its production after notice; thus compel the former to resort to parol evidence, and under the color of a cross-examination, introduce like evidence. In this class of cases the rule would thus be wholly abrogated, and the mischief which it intends to exclude, induced. 1 Greenleaf. Ev. § 87, 88, 463, 465, 509, 563. 1 Phil. Ev. 441. 1 Cow. and Hill 1219, note 862.

Underwood & Hard for the defendants.

I. Where a party seeks to charge a copartnership, by virtue of the contract of copartnership, and not by reason of such a holding out, as to indicate to the world that a copartnership exists, the party so seeking to render the firm liable, must take the contract as it actually is between the members, and subject to all the restrictions and limitations contained in it; and this whether such party has notice of such restrictions, previous to the dealing with the firm or not.

II. But if this were not so, a stipulation in the contract of copartnership, that one of the members shall not be bound by the contracts of the others, in relation to the partnership business, is binding upon all who have knowledge of such stipulation, before having any dealings with the firm. Coll. on Part. § 98, 387, 388, 388. *Dow v. Seyward*, 12 N. H. 275. *Galway v. Matthew*, 10 East. 264. ——— *v. Layfield*, 1 Salk. *Vice v. Fleming*, 1 You. & Jerv. 227. *Boardman v. Gore*, 15 Mass. 331. *Cargill v. Corby*, 15 Miss. 124, cited 14 U. S. Dig. 463. *Leavitt v. Peck*, 3 Conn. 124. *Alderson v. Pope*, 1 Camp. 404. *Ensign v. Ward*, 1 John. Cases 171. Story on Part. § 128, 129, 130. Chitty on Con. 256. 1 Stark 164. 2 E. C. L. R. 339, *Willis v. Dyson*.

III. The book offered by the plaintiffs, purporting to contain the statute of New York, relating to limited partnerships was properly

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rejected. The validity and effect of the contract between the defendants, and the obligations and liabilities created by it, are to be determined by the law of Vermont, and not by that of the state of New York; *Cutler v. Estate of Thomas*, 25 Vt. 73.

IV. The plaintiffs' objections to the deposition of Rockwell, offered by the defendants, were properly overruled.

The plaintiffs having read the ex parte depositions of the same witness, taken without notice to the defendants, and relating to the same matters embraced in the deposition which was objected to, the defendants had the right to use the deposition in question, as a cross-examination. If this were not so, great injustice would be done, for a party, by taking an ex parte deposition, could exclude all that the witness might know in favor of the other party.

The opinion of the court was delivered by

ISHAM, J. Upon the facts stated in this case two questions have been urged upon our consideration. In the first place, is the defendant Hopkinson liable, as partner, for the plaintiffs' account? and, in the second place, was the deposition of Rockwell, taken by the defendant Hopkinson, properly received in evidence?

It is obvious that Hopkinson is not liable in this action, in consequence of his name and credit having been held out to the world as a partner. To render a person responsible on that ground, a positive consent, or at least a knowledge by him of such a use of his name, from which his acquiescence may be inferred, must be shown. *Gow* on Part. 12, 24, 129. The facts fully appear, in this case, that Hopkinson never purchased any goods himself for the firm, nor did he ever consent that any should be purchased on his credit or responsibility. The business of the firm was transacted in the name of George H. Paul. No consultations were had with Hopkinson in relation to the business of the firm, nor were any directions given by him in relation to its management; but, on the contrary, soon after the copartnership was formed, he left this state, and did not return until after the failure of Paul. If, by his consent, his name had been used in that manner, his liability for this account would have followed, on principles of general policy, though he might not have received any portion of the profits of the business. *Wagh v. Carver*, 2 H. Blac. 235,

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If Hopkinson is liable in this action, it is upon the ground that he was a party to the articles of copartnership, and, as such, entitled to receive his proportion of the profits of the business. As a general rule, when goods are sold to, and upon the credit of a firm, all the members of that firm are individually responsible for them, and that individual liability is not affected by any reservation or agreement between themselves, that one of the firm shall not be responsible. In such case it will make no difference whether the business was carried on for the benefit of the partners, or for the benefit of others; nor is it material that the business was transacted in the name of all the partners, or in the name of one of them. The liability of each partner for the debts of the firm rests upon principles of commercial policy. It arises from the necessity of those commercial operations for which partnership relations are formed, and from the principle also, that, as they receive a portion of the profits, and thereby subtract to that extent from the assests of the firm their means for the payment of debts, they shall be responsible for the debts of the firm. *Waugh v. Carver*, 2 H. Black. 235. 1 Smith's Lead. Cas. 831—note. In such case the principle applies which has been urged in the argument of this case, that an agreement, between the partners, that one of the members of the firm shall not be liable for the debts of the partnership, and that no purchases shall be made on his responsibility, is a regulation purely *inter se*, and has no effect upon the individual liability of every partner to the creditors, when in good faith the debts were contracted upon such responsibility. Story on Part. § 104-5. If this case, therefore, rested upon the facts stated in the two depositions of Rockwell, which were taken and used by the plaintiffs, that Hopkinson was one of the partners, and entitled as such to a portion of the profits, and that these goods were sold on the credit of the firm, the liability of the Hopkinson would clearly exist, and it would not be affected by any provision in their articles of copartnership, that the goods were to be purchased on the responsibility of Paul, and that Hopkinson was not to be liable for such purchases to the creditors. Such a provision would have no effect as against the creditors; each individual member of the firm would be liable to the creditors, though, as between themselves, they would have no right to charge Hopkinson with the amount. That

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was the express decision of the court in the case of *Waugh v. Carver*, 2 H. Black. 235, and the various cases to which we were referred.

But there is another fact which enters into the consideration of this case, which did not exist in those cases; and that is, that these plaintiffs were informed, at the time these goods were purchased by Paul, that, under the articles of copartnership, the goods were to be purchased by the other members of the firm, and on their responsibility alone, and that Hopkinson was not to be liable for goods purchased for the use of the company. With the distinct and express knowledge of that fact, communicated by the members of this firm, when the goods were purchased, the plaintiffs had no right to make the sale of those goods in any reliance upon the responsibility of Hopkinson for payment, without his personal consent.

The authorities on this subject are express in their language, and too numerous for us to entertain any doubt on this subject. In Story on Part. § 128, the rule is given, that "every contract, in order to bind a firm, must be made with a party who has no knowledge or notice that the partner is acting in violation of his obligations and duties to the firm, or for purposes disapproved of, by or in fraud of the firm. For any such contract, made with such knowledge or notice, will be void as to the firm, however binding it may be upon the individual partner making it. This doctrine," he observes, "follows from the known limitations of the laws of agency; for no agent can bind his principal in any transaction, in which he knowingly exceeds his authority, or knowingly colludes with another person, having notice of any violation of the rights of his principal." In Collyer on Part. § 98, 387-8-9, it is said, that "when the creditor has express notice of a private agreement between the partners, by which either the power of one partner to bind the firm, or his liability for partnership contracts, is qualified or defeated, it is clear that the creditor himself must be bound by the arrangement between the partners." The same doctrine is sustained by many decisions in England as well as in this country, and it would seem that the justness of the rule has commended itself to the laws of most commercial countries. *Willis v. Dyson*, 1 Starkie 164, *Galhoay v. Mathew*, 10 East. 264,

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Vice v. Fleming, 1 Y. & Jer. 227. *Leavitt v. Peck*, 3 Conn. 125. 15 Mass. 339. 12 N. H. 275. 1 Camp. 404.

In many cases it has been held, that notice to a creditor not to deal on the credit of a firm, given by one partner, will protect him from any future liability to that creditor, though no provision of that kind is contained in the articles of copartnership. It is obvious, that this case is much stronger, where that limitation is one of the fundamental articles of their copartnership, and was an original limitation of their agency.

This general doctrine is confirmed and illustrated by the principles regulating limited partnerships. In such partnerships, it is held, that if the liability of the partners is not legally limited, as provided by the act, they are liable as general partners, as they participate in the profits of the concern. The cases proceed upon the ground, that there has been no legal limitation of their agency or liability. But, in this case, the partnership was formed on common law principles, and there was a legal limitation as to the liability of Hopkinson, and of the agency and power of the other partners to bind him on their contracts of purchase. The extent of that power, and whether a liability rests upon Hopkinson or not, is to be decided by the laws of this state, where the partnership was formed, and where was their place of business. It was so held in the case of *Cutler v. Thomas*, 25 Vt. 73. The law of the state of New York was, therefore, properly held inadmissible, as it could have no effect in determining the liability of Hopkinson, or the right of the partners to bind him by their contracts of purchase. We think, therefore, that Hopkinson is not liable for this account of the plaintiffs, and that the charge of the court on this subject was correct.

We think, however, that the deposition of Rockwell, which was taken by Hopkinson on the 17th of February, 1853, was improperly admitted in evidence to the jury. It was by that deposition that the contents of the written articles of copartnership were proven; and from which it appeared that Hopkinson was not to be liable for any debts which might be contracted in purchasing goods. The creditors were probably at liberty to prove, that the defendants were partners, independently of that written agreement, (25 Vt. 73,) but clearly, they had that right in this case, as they had

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given the defendants notice to produce the original articles of copartnership. But the defendants had no such right. That original agreement was in their possession, and under their control ; or, at least, such is the legal presumption. It was their duty, therefore, to produce the original agreement, to prove the provisions of that contract, on which rested their defense, as that instrument afforded the highest evidence of the terms of their copartnership. The case of *Brogart v. Brown*, 5 Pick, 18, is similar to this case on this point, and, we think, is decisive on this question. We see no ground upon which we can sustain this judgment, by treating this deposition as a cross-examination of the witness, or as a continuance of the depositions of the witness, which were taken by the plaintiffs. For this matter, the judgment of the county court must be reversed, and the case remanded.

DAVIS & AUBIN v. JOHN BRADLEY & CO.

Factor's lien upon consigned goods. Bills of lading and shipping receipts.

To give a factor a lien upon goods consigned to, but not actually received by him, the consignment must be to him in terms, and he must have made advances or acceptances upon the faith of it.

B. & H. B. delivered to the defendants, who were storage and forwarding merchants, several sacks of wool, for which the defendants gave receipts, specifying that they were for the plaintiffs, or to be forwarded to the plaintiffs. These receipts were sent to the plaintiffs; and they, upon the credit of, and with reference to said wool, accepted drafts drawn upon them by B. & H. B. Held, that the plaintiffs thereby obtained the constructive possession of the wool, and had a lien upon it for the amount of their acceptances.

Consideration of the law respecting the transmission and endorsement of bills of lading and shipping receipts.

Where the forwarding merchant gives a shipper's receipt or inland bill of lading for goods shipped on board a boat on Lake Champlain, acknowledging to have received them to be forwarded to the consignees by name, and this is sent to the consignees, and they make advances upon the faith of it, the title and possession of

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the goods are thereby so far vested in the consignees, that they are not liable for the consignors' debts, or, if so, only subject to the consignees' lien for advances.

TROVER for thirty-one bales of wool. Plea, the general issue; trial by jury, March Term, 1855,—PIERPOINT, J., presiding.

The wool originally belonged to Sanborn & Catlin, of Swanton, and was sold by them to B. & H. Boynton, of Hinesburgh, and forwarded to the defendants, who were storage and forwarding merchants, at Burlington, early in the spring of 1848; and was attached by the defendants on a writ in their favor against B. & H. Boynton, on the 20th of June, 1848, and on one in favor of Vilas & Noyes against B. & H. Boynton, on the same 20th of June, 1848; and was left by the officer making said attachments in the possession of the defendants, where said wool remained until it was sold on the execution of the defendants, issued on the judgment obtained in the suit on which the attachment was made.

The plaintiffs, to sustain the issue on their part, introduced, among other papers, four receipts signed by the defendants, of which the following are copies,

"Received of B. & H. Boynton thirteen bales wool, to forward
"Davis & Aubin, Boston, via Western Railroad. Burlington,
"May 30th, 1848."

"Received of B. & H. Boynton, June 9, 1848, six sacks wool,
"weighing twelve hundred and eighty-five pounds, to be shipped
"to Davis & Aubin, Boston. Burlington, June 9, 1848."

"Received of B. & H. Boynton, twenty-one bales wool, to be
"forwarded to Davis & Aubin, Boston. Burlington, June 13,
"1848."

"Received in store, June 15th, 1848, of B. & H. Boynton, for
"Davis & Aubin, Boston, two bales wool, by W. R. R. from Green-
"bush."

and three drafts drawn by B. & H. Boynton upon the plaintiffs, in favor of Jediah Boynton, at three months, one for \$400, dated May 30, 1848, one for \$500, dated June 5, 1848, and the other for \$500, dated June 9, 1848, all of which the plaintiffs had accepted and paid;—also, letters from B. & H. Boynton to the plaintiffs, dated May 30th, June 2d, June 10th, and June 13th, containing invoices of different lots of the wool, referring to the above receipts as enclosed, and advising the plaintiffs of the drawing of

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the above drafts, &c.;—also, the shipping book of the defendants, showing that twenty-nine bales of said wool was shipped on board of the boat *Empire*, on Lake Champlain, on the 15th of June, 1848, consigned to the plaintiffs; and it appeared that said wool was attached while it was on board of said boat on Lake Champlain, and brought back to the defendants' store-house, where it remained till it was sold on their execution against B. & H. Boynton; and that the remaining bales had never left the defendants' store-house, and were attached while there. The testimony of Phillip I. Aubin, one of the plaintiffs, tended to show that the plaintiffs were commission merchants in the city of Boston; that in the fall of 1846, they entered into a contract with B. & H. Boynton, by which the said Boyntons were to forward to the plaintiffs wool, and invoices and receipts of wool, and the plaintiffs were to accept their drafts to the amount of two-thirds or three-fourths of the value of the wool sent forward; that this contract went into effect and continued up to the time of this transaction; that they opened a general account with the Boyntons, kept debt and credit, charged the drafts when accepted, and charged freight and expenses, and gave credits for sales made; that Boyntons sent their drafts, all along during said time, and they accepted them in reference to and in regard to what wool they had on hand and what was on the way to them; in short, in reference to the general statement of their account; that they had five per cent commission and charged interest on general average.

The plaintiffs also introduced testimony showing a demand of the property on the 30th of June, 1848, and a refusal by the defendants to give it up.

The defendants then introduced their writ of attachment, judgment and execution, and the officer's return thereon; and claimed that the plaintiffs were not entitled to recover; and, at all events, that the question should be submitted to the jury whether the drafts were accepted by the plaintiffs, specially on the wool in question, or upon general account, and that, in the latter case, the plaintiffs were not entitled to recover.

The court charged that if the jury found that it was agreed that the Boyntons were to consign the wool, and forward to the plaintiffs the shipper's receipt or bill of lading, and the plaintiffs were to

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accept the drafts as stated by Aubin, and the wool was so shipped and consigned, and the bill of lading or shipper's receipt forwarded and drafts drawn and accepted upon the credit of, and with reference to the wool so forwarded, that the plaintiffs would have the constructive possession of the wool on hand, and that the same was not subject to attachment as the property of B. & H. Boynton, and the plaintiffs would be entitled to recover the value of the wool unless it exceeded the amount of the plaintiffs' lien, if so, the amount due them on the three drafts. Exceptions by the defendants.

D. A. Smalley and F. G. Hill for the defendants.

The facts in this case did not give to the plaintiffs a constructive possession, and at most would only have that effect as between the consignor and a third party who had acquired a right from the consignee. 3 T. R. 119-123, *Kinloch v. Craig*; 1 Eng. Ex. R., 422, 3 Price 547, S. C., *Nichols v. Clent*; 39 Common Law 260, *Mitchell v. Ede*; 5 Maule & Selwin 350, *Patten v. Thompson*; 3 Mees. & Wels. 15, *Bruce v. Wait*; 2 Washington, C. C. R. 283, *Walter v. Ross*; 23 Vt. 217, *Elliott & Boynton v. J. Bradley & Co.*; 1 Smith's Leading Cases 760.

The defendants' receipts, forwarded by the Boyntons, made no change in the title or possession of the wool, and cannot be treated as bills of lading which carry title by delivery and endorsement, and the plaintiffs had no legal right to rely upon them as such. 11 Eng. C. L. 309, *Akerman v. Humphrey*; 49 Eng. C. L. 699-700, S. C. cited and approved by TINDALL, C. J.

G. F. Edmunds and L. E. Chittenden for the plaintiffs, cited *Davis & Aubin v. Bradley & Co.*, 24 Vt. 55; *Bryans v. Nix*, 4 Mees. & Wels. 774; *Haille v. Smith*, 1 B. & P. 563; *Holbrook v. Wight*, 24 Wend. 335; *The St. Jose Indians*, 1 Wheaton; *Gardner v. Howland*, 2 Pick. 599.

The opinion of the court was delivered by

REDFIELD, CH. J. The question in the present case is in regard to the right of a factor to a lien upon goods consigned to him and upon which he has made advances. ASHURST, J., in giving the opinion of the court in *Lickbarrow v. Mason*, 1 H. B. 357; 2 T. R. 63; 6 East 21, a very leading case upon this sub-

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ject, says in regard to a bill of lading, "If the consignor had intended to restrain the negotiability of it, he should have confined the delivery of the goods to the vendor only, but he has made it an endorsable instrument." The judge seems to consider the fact, that the bill is made to deliver to assigns, essential to its validity, in the hands of a *bona fide* purchaser of the goods; 3 B. & Al. 282; 1 Ld. Raym. 271. And in Chitty on Contracts it is said, p. 485, "if the bill of lading be to deliver to A, he should be plaintiff. The bill of lading will decide who shall sue the carrier," citing *Bryans v. Nix*, 4 M. & W. 775. The form of expression used by Mr. Chitty as indicating who is to bring the suit, upon the face of the contract of consignment, or receipt by the carrier, is the very identical language of two of these receipts. "June 13, 1848. Received of B. & H. Boynton, twenty-two bales of wool, to be forwarded to Davis & Aubin." The one of May 30, is "to forward to Davis & Aubin," and that of the 15th June, is, "Received in store, &c., of B. & H. B., for Davis & Aubin," which is still more explicit, if possible. In the case of *Bryans v. Nix*, the paper called indifferently a shipping receipt, and a bill of lading, was not made to assigns, but only to the plaintiffs, and the effective part of the contract was to be delivered to Delany & Co. at Dublin, in care for and to be shipped to the plaintiffs in the action, which is certainly no more express in its undertaking to forward the goods to the plaintiffs, than the contract of the defendants in the present case. In either case it is an express promise to deliver to the consignees. It can, by no kind of refinement, be made to signify anything else. And according to all the cases, if the plaintiffs had been purchasers, this would have vested the absolute title in them, subject only to the right to stop *in transitu*, which right might have been defeated by a *bona fide* transfer of the bill of lading for value. In *Hall v. Griffin*, 10 Bing. 246, it was held, that the transfer of a wharfingers's receipt was a transfer of the property. And TINDALL, CH. J., said, "it had been the practice to consider money advanced, upon a wharfinger's receipt, in the same light as if advanced on the actual delivery of goods." And the holder of a lighterman's receipt is said to have a control over the goods till he can obtain a bill of lading; *Craven v. Ryder*, 6 Taunton, 433.

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As contended by counsel in the case of *Bryans v. Nix*, the contract was destitute of almost all the essentials of a bill of lading. It was no voyage at all, but a mere transfer along a canal boat to Dublin, and from thence to Liverpool. But the court held that the consignees acquired a sufficient title to all the cargo which was actually put on board the boat by the consignors, before the shipping receipt was executed, and forwarded to the plaintiffs, but not to such as was then under their control and not shipped, so that the mere promise to ship certain articles set apart, would not be sufficient, but it must actually be done, and the shipper's receipts, according to most of the cases, forwarded and the bill accepted, or advances made upon the faith of such shipment, before any new destination is given to the cargo. Until that is done the matter is ambulatory, and dependent upon the will of the consignor. But afterwards, it is beyond recall. In that case the consignor altered his mind before the second boat was loaded and gave an order to the shipper to have its cargo delivered to another person, as also the first. And the court held that the first was beyond his control, and not the second because the order was countermanded before it was shipped.

It seems impossible to distinguish the present case, in principle, from the case of *Bryans v. Nix*. There are many cases where a symbolical delivery of goods with an advance, or acceptance upon the faith of the delivery of such symbol, has been held to create a lien upon the goods, the same as the actual delivery. In *Hall v. Griffin*, 10 Bing. 246, before referred to, one Willson was the owner of goods, which were about to be shipped from Stockton to London and took a wharfinger's receipt for them, which he handed over to the plaintiff upon an advance of money. The plaintiff showed this wharfinger's receipt to the wharfinger at London before the goods arrived, and he promised when they did arrive to deliver them to the plaintiff. And the court held, that the plaintiff acquired such an interest in the goods as would enable him to maintain trover. This is put, by the court, upon the ground, that it was a symbolical delivery of the goods, the same, says BOSANQUET, J., as if the goods passed from hand to hand.

In the case of *Craven v. Ryder*, 6 Taunton 433, the plaintiffs contracted to sell sugars to one French, and put them on board the

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ship for that purpose, but took a lighterman's receipt for them as shipped "for and on account of the plaintiffs," and although the master gave a bill of lading, certifying that the goods were shipped for French, or his assigns, it was held, that he did this in his own wrong until the lighterman's receipt was surrendered. That was the contract of consignment, until exchanged for the bill of lading.

So that, to give a factor a lien upon goods consigned, but not actually received, these incidents must concur. 1. The consignment must be, in terms, to the factor. That was so in the present case, as much as if a formal bill of lading had been made in his name, omitting assigns. So that the undertaking of Bradley & Co. is, in terms, to forward them to Davis & Aubin, and for their benefit. They are upon the face of the forwarder's receipt, (which is in fact a bill of lading, as far as one can properly exist in these inland transactions,) the party entitled to sue, and the instrument binds the defendants to forward the goods to the plaintiffs, and equally binds the carrier, to deliver to them, and, *prima facie*, the plaintiffs are the only party entitled to receive the goods, upon the face of the transaction. B. & H. Boynton had parted with their control over them. 2. But to the conclusiveness of such a contract against creditors and subsequent purchasers, it is requisite that the consignee should have made advances or acceptances, upon the faith of these particular consignments. That, too, we think is shown by the testimony, and found by the jury.

In addition to this, which seems commonly sufficient to give the factor a lien, and is all that existed in *Holbrook v. Wight*, 24 Wendell, 169, and which seems to us to be a sensible, and we see no reason to doubt, a sound case, in addition to all this, the present case does contain what all the cases and all the books upon this subject, as far as I can learn, have ever regarded as a symbolical delivery of the goods, the sending to plaintiffs the shipper's receipt, which is, in effect and in terms, a consignment, or bill of lading to the plaintiffs. For what is a bill of lading? It seems to be nothing more than an acknowledgment that the goods are put on board the ship, at one port, to be delivered to A. B. at another port, or to his assigns. This contract is commonly executed in triplicates, one of which is kept by the master for his own information, as to the nature of his undertaking, one is retained by the consignor, to show

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that he has shipped the goods, the other, which is the only one intended to be negotiated, is forwarded to the vendee or factor, and if these persons endorse such bill of lading, for value, it passes the title of the goods even to the defeating of the right to stop *in transitu*. The consignor may, if he choose, take the bill of lading in his own name, and then he can endorse it. But, unless he restricts the consignment to be delivered for his own use, the consignee is the party *prima facie* entitled to control the delivery, and the title. And this is the form of the present consignment. And the shipper's receipt, being delivered to plaintiffs, and acceptances made upon its faith, the plaintiffs' title was perfected to the extent of their lien, and this point is expressly put to the jury and found.

This point was considered and decided by the court when the case was last before us, and is reported in 24 Vt. 55, and the re-argument and re-examination has confirmed our convictions of the entire soundness of the decision. We do not think the question is one susceptible of reasonable doubt, and it seems to us to have been properly submitted to the jury, so that we might here content ourselves by affirming the judgment; but we are induced to examine the cases further to some extent.

The case of *Holbrook v. Wight*, 24 Wendell 168, is a full authority for the decision of the county court in this case. There the plaintiffs were commission merchants in New York, and their correspondents manufacturers at Middlebury, Vermont. They advised the plaintiffs of the goods being in readiness to be forwarded to them, and that they would be sent to a house in Troy, as soon as consistently could be, to be forwarded to the plaintiffs in the spring. That was done, and the goods sent to a forwarding house in Troy, with instructions to forward them to the plaintiffs upon the opening of navigation. The consignors, about this time, drew upon the plaintiffs for \$6,000, at different dates, which the jury found, as they did in the present case, the plaintiffs accepted relying upon these consignments. The consignors, being pressed by other creditors, made a different disposition of the goods, while remaining in the hands of the forwarder, at Troy, and ordered them into other hands, and to be delivered to other parties. But the court held that the lien of the first consignees was perfected, and the subsequent disposition of the property could not defeat their rights. In

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this case there was nothing like a symbolical delivery which does exist in most of the English cases upon this point, and equally in the present case, and which seems to be regarded, by most jurists and merchants, as an essential element in a consignment to a factor, in order to perfect his lien for advances made upon the faith of such consignment, and which fact is regarded as amounting, in all cases, to a substantial change both of title and possession. The case of *Taylor v. Kymer*, 3 B. & Ad. 320, is a very elaborate and well considered case, where this distinction is fully recognized. It may be here noticed that some of the English cases treat a formal bill of lading as strictly negotiable, notwithstanding the omission of the word assigns; *Renteria v. Reuding*, 1 M. & M. 511. But no question of that kind arises in the present case; see 1 Smith's Leading Cases, 260, note to *Miller v. Race*, where the proposition is attempted to be maintained that no instrument, by the English common law, is strictly negotiable, unless in terms made to assigns, or order, or bearer, &c., that is, unless its negotiable quality appears, in terms, upon the face of the instrument. None of the principles laid down in the case of *The Frances*, 8 Cranch, 335 *et seq.*, have much application to this subject, as the questions there discussed have reference to prize cases, nor does any general principle there laid down conflict at all with our decision here. *Mitchell v. Ede*, 39 Eng. Com. Law, 260, 11 Ad. & Ellis, 888, is decided chiefly upon the question of the intention to consign the particular goods, and the effect of endorsing a bill of lading, as passing the absolute title, and so far as the symbolical delivery is concerned, is an authority for our present decision. In the case of *Elliott & Boynton v. the defendants*, 23 Vt. 217, there was no advance or acceptance upon the faith of any particular consignment, and nothing like a symbolical delivery, which leaves the case wholly dissimilar to the present. No shipping list or receipt was ever delivered to the plaintiffs in that case, by any one. The case of *Whitehead v. Anderson*, 9 M. & W. 534, where it is held that, to constitute a constructive possession in the consignee, the forwarder or carrier must enter into some new and specific contract to deliver to the consignee, is this very case, as we understand the shipper's undertaking. The case of *Gardner v. Howland*, 2 Pick. 599, seems to us a full authority for the decision we here make. Here,

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the delivery of the invoice, with an assignment, is regarded as a symbolical delivery of the ship. Without speaking in detail of the other cases, which seem to us more remote from the very points involved in this case, we conclude by saying that no case, and, so far as we can perceive, no principle conflicts with the plaintiff's right to recover.

It is scarcely needful to advert to any criticisms which were attempted at the bar, upon the opinion of the court in the 24th of Vt. in the same case. We have shown that the decision is sound and tenable, we think; and, if it were not, it must, according to the settled practice of this court, govern the same case; but we do not consider that the opinion of the court, as there reported, is fairly open to the objection that it is extra-judicial, and mere *obiter dictum*, because the judge does not confine his argument to the single point urged by counsel. That might have been sufficient, but it was by no means so entirely free from all cavil, as the reason urged by the learned judge, which, so far from being his own individual speculation, was the very ground, and the chief ground upon which the case was rested by the different members of the court at the consultation, and is too well and too convincingly stated, to require any attempt at support or commendation from me.

Judgment affirmed.

EDWARD THORPE v. J. & J. H. PECK & Co.

Promissory note. Dishonor and notice to endorser.

A note payable at a bank may be presented there for payment at any time during banking hours on the day of its maturity, and if not paid when so presented, it may be treated as dishonored; and a notice thereof, given immediately and before the close of banking hours on the same day, will charge the endorser.

ASSUMPSIT against the defendants as endorsers of a promissory note signed by H. W. Catlin. Plea, the general issue; trial by the court, March Term, 1855,—PIERPOINT, J., presiding.

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The plaintiff introduced in evidence, and proved the execution by H. W. Catlin, and the endorsement by the defendants of the note described in his declaration. In order to charge the defendants as endorsers, the plaintiff proved that on the ninth day of August, 1854, the note was presented for payment at the Commercial Bank in Burlington, during the usual business hours, and was not paid. The business hours of the bank were at that time usually from nine o'clock, A. M., till four o'clock, P. M., but sometimes the bank was kept open later than that hour for business, and any person coming to do business after that hour would, by the practice of the bank at that time, be admitted for business, if an officer of the bank were there. About four o'clock, P. M. of that day, the cashier of the bank took to the store of the defendants in Burlington a written notice of the non-payment of the note for the defendants, and delivered it to one of them.

Upon these facts, the court rendered judgment for the plaintiff for the amount of the note and costs, to which the defendant excepted.

W. W. Peck and *E. Harvey* for the defendants.

The note was payable at the bank; the maker had till 4 o'clock, P. M. of the day of maturity for payment. Till then, there was no default upon his part; 21 Pick. 310, *Church v. Clark*.

"Notice is bad, if it be before a dishonor;" Story on Notes, § 320. In this case, if the notice was given before 4 o'clock, P. M., it was *before the dishonor* and *premature*. It was given about 4 o'clock, P. M. It does not appear whether it was before or after that hour—whether premature or seasonable. If premature, endorsers were not charged; the duty rests on the holder to show all the steps to have been taken, which were requisite to charge the endorsers

Geo. F. Edmunds for the plaintiff.

"When a bill is accepted, payable at a bankers, it must be presented there *before* the usual hour of shutting up their shop." Chitty on Bills, 387; Story on Notes § 226. This note "was presented for payment *during the usual business hours*;" Byles on Bills, [166.]

"After refusal to pay on demand made on the day when the money is due according to the contract, the note or bill is dishon-

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ored, and notice may be immediately given;" 1 Pick. 401, *Shedd v. Brett*; Bailey on Bills, 261; Story on Notes, § 320. 91

The opinion of the court was delivered by

ISHAM, J. The presentment of this note for payment was made at the bank during its business hours, on the day it fell due, and was not paid. It does not appear at what time of that day the presentment was made, whether during the former or latter business hours of the bank;—neither do we regard it as in any way material. When a note is payable at a bank where its business is transacted during certain specified hours of the day, the note may be presented during any of those hours, and it is the duty of the maker to provide for its payment whenever the presentment is made. If the note is not paid when presented, the holder is at liberty to treat it as dishonored, and it is sufficient to charge the endorsers; *Osborne v. Monclure*, 8 Wend. 170; *Flint v. Rogers*, 15 Maine 67.

The notice of non-payment of this note was given about 4 o'clock, P. M., on the same day it was presented for payment and dishonored; and we think it is sufficient to charge the defendants as endorsers. The fact that notice was given earlier than was necessary or is required, is not an objection that can be urged by them. The rule is, that notice *may be given* the same day the paper is dishonored; and at farthest, it *must* be on the following day; *Grand Bank v. Blanchard*, 23 Pick. 305; *Shedd v. Brett*, 1 Pick. 405; *Burbridge v. Manners*, 3 Camp. 193. In order to charge the endorser, notice may be given immediately upon the dishonor of the note. There are many cases in which it has been held that, not only, notice of dishonor may be given to charge endorsers, but that a suit may be commenced, on the day of its dishonor against the maker, and endorser after notice has been given; *Staples v. Franklin*, 1 Met. 43, and cases cited. But, as a general rule, the maker has the whole of that day in which to make payment; and there is no default on which *an action can be sustained* until the next day. The question, however, as to the time when notice may be given to *fix the liability of an endorser*, is not the same with the question, at what time a *suit may be brought*. So far as it may be necessary to fix the liability of endorsers, the demand may be made,

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and notice given on the day the note falls due, and is dishonored; but a suit may not be commenced until the next day. These principles and that distinction was recognized in the case of *Osborn v. Monclure*, 3 Wend. 179, and in *Thomas v. Shoemaker*, 6 Watts & Sergt. 179. In this last case, the action was against an endorser of a note. The demand of payment was made on the day the note fell due, and notice of its dishonor was given on the same day between three and six o'clock, P. M. Gibson, Ch. J., observed that "the contract of the acceptor or maker is to pay on demand, and that is broken if the bill be not paid *the instant it is presented*:" "from which," he observes, "it results that notice may be given the same day. It is true," he says, "an action cannot be brought till the next day, for the reason that the maker may pay after refusal if he take the trouble to seek the holder;" *Coleman v. Carpenter*, 9 Barr 178; 1 Amer. Lead. Cases 395. Whatever may be the rule as to the time when an action may be commenced, we think the notice is sufficient in this case to render the defendants liable on their endorsement of this note.

The judgment of the county court is affirmed.

SALLY AUSTIN v. WILLIAM C. HARRINGTON.

[IN CHANCERY.]

Usury.

The defendant borrowed of the oratrix, through her general agent, a sum of money for which he gave his note; and on the same occasion, but without the personal knowledge of the oratrix, he purchased a span of horses belonging to the agent for \$400,00, and gave his note to the agent for that sum and subsequently paid it. The horses were not worth over \$225,00. The defendant made the purchase and agreed to give \$175,00 more than the horses were worth for the purpose of procuring the loan. Held that the \$175,00 thus received by the agent was usury, and should be deducted in ascertaining the amount due on the oratrix's note.

BILL OF FORECLOSURE OF MORTGAGE. The master, to whom it was referred to ascertain and report the amount due, reported

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the following facts. On the 5th of March, 1847, the oratrix loaned to the defendant the sum of \$ 7,000.00, for which the defendant gave his note, payable to the oratrix, and secured by mortgage. Gustavus A. Austin, the son of the oratrix, was her general agent to transact her business, and the contract for said loan was made by and between the defendant and the said Gustavus A, as the agent of the oratrix, at the house of the oratrix in Orwell; and it did not appear that the oratrix was consulted by either the said Gustavus or the defendant, concerning said loan, or that she was informed by the said Gustavus that he was making, or had contracted to make said loan in her behalf.

On the occasion of said contract for said loan being made, and at the same time, the said Gustavus sold to the defendant a pair of bay horses at the price of four hundred dollars, for which horses, the defendant gave his note to the said Gustavus for four hundred dollars, payable on demand, with interest. The horses were the property of Gustavus, and the money loaned was the property of the oratrix; but it did not appear that the oratrix had any knowledge of the sale of said horses, by the said Gustavus, to the defendant. This note for \$ 400,00 was subsequently paid in full to the said Gustavus. The horses, so sold to the defendant by the said Gustavus, were not worth over two hundred and twenty-five dollars.

The defendants insisted that the sale of the horses by the said Gustavus to the defendant for a price so much exceeding their value, was a cover for usurious interest on said loan; and that, although the horses were the property of the said Gustavus, and the money loaned was the property of the oratrix, the security taken by the oratrix was tainted with the usury; and, on this point, the master found that, as the loan was made to, and the horses were purchased by the defendant at the same time, and on the same occasion, and as the defendant paid \$ 175,00 more for the horses than they were worth; he made the purchase of the horses at the price of \$ 400,00 for the purpose of procuring said loan, though nothing was said that the purchase of the horses should be a condition of the loan; and that if the court were of the opinion that such purchase under this state of facts, made the loan usurious, then the \$ 175,00 paid for the horses more than they were worth,

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should be deducted from the \$ 7,000,00 for which the defendant gave his note.

The master reported the amount due both on the basis of deducting, and also of not deducting the sum of \$ 175,00 from the original loan of \$ 7,000; and the court of chancery made their decree for the payment only of the sum reported on the basis of deducting said sum of \$ 175,00, and from their decree the oratrix appealed.

There were other subsequent transactions between the parties in reference to the above, and an additional loan, which were reported upon by the master, but upon which no question was decided by the supreme court, and which it is therefore unnecessary to detail.

Peck & Harvey for the oratrix.

C. Russell for the defendant.

The opinion of the court was delivered by

ISHAM, J. The question in this case arises upon the report of the master, in stating the balance due on the mortgage debt, on which this bill of foreclosure is brought. It is claimed that the sum of \$ 175,00 should be deducted from the debt for which this mortgage was given, as having been usuriously taken at the time the loan was made. There is no doubt that such should be the result, if, in point of fact, the transaction was usurious, and that amount was paid under those circumstances; for it is optional with the party paying the money, to treat it as paid on the debt, or as a payment having no connection with the legal demand, and bring his action to recover it back; *Nichols v. Bellows*, 22 Vt. 581. The loan in this case was made by the oratrix through the instrumentality or agency of her son, Gustavus A. Austin. It was for the purpose of procuring the loan, as the fact is stated by the master, that the horses were purchased of Mr. Austin at the sum of \$ 400, being \$ 175,00 more than their actual value in money; and for which a note was given to him; and another note for the money loaned was given to the oratrix. If, instead of giving separate notes, the whole amount had been included in one note, payable either to Mr. Austin or the oratrix, no one would doubt but that,

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under such circumstances, the transaction would be usurious, and that the sum paid, over the true value of the horses, should be deducted from the note. The same principle would apply if each of these notes had been made payable to the same person. The statute against usury is not avoided by taking separate securities nor by making those securities payable to different persons who were parties to, and cognizant of the usurious transaction. The contract being entire, and that an unlawful one, all the securities are equally affected; *White v. Wright* 3 B. & Cress. 273; *Bridge v. Hubbard*, 15 Mass. 96; *Nelson v. Cooley*, 20 Vt. 201. The general principle is also well settled that, where goods or property is taken by the borrower in lien of money, and for the purpose of affecting the loan, the transaction is usurious, unless the property is not only fairly worth the sum at which they were estimated, but would easily be made available in the borrower's hands for raising that sum by re-sale; *Byles on Bills*, 249; *Davis v. Hardacre*, 2 Camp. 375; *Bank of U. States v. Owen*, 2 Pet. 527. Though nothing was said that the purchase of the horses was a condition upon which the loan was obtained; yet, the fact is found by the master that the purchase was made at the price of \$400,00 for the purpose of procuring the loan. We are to understand from this, that the loan could not be procured except that purchase was made; and, as the sum paid much exceeded the actual value of the horses, the case falls within the general principles which render the transaction usurious.

It is insisted, however, that the note given to the oratrix, which was only for the money actually loaned, is unaffected by that sale, and that she is not bound by any act of Gustavus A. Austin in that negotiation, which was not expressly authorized by her, and of which she, at the time, had no knowledge. In the case of *Baxter, Admr. v. Buck*, 10 Vt. 548, it was held that, "where an agent, authorized to settle a debt due the estate, takes a note to the administrator for the principal sum due, and one to himself for the usurious interest, the first note is not void, unless the administrator knew of the usury and assented to it." That was a case of a limited and special agency, in which the employment was only for that single transaction, and where the principal was not bound by any act of the agent not expressly authorized by him. In such

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case, it is incumbent on the party dealing with the agent, to ascertain the extent of his authority. We have no occasion to question the soundness of that decision, as the case under consideration is not one of that character. It is expressly stated by the master, in this case, that Gustavus A. Austin was not only the agent of the oratrix in making this loan, but that he was *her general agent in the transaction of her business*. The nearness of their relationship, and the circumstances, that the loan was made without consultation with the oratrix and that she permitted him to use or loan her money in that manner, as well as the subsequent negotiations in relation to it in changing the securities, and increasing its amount, shows the general character of his agency, and the trust she placed in him. Under such circumstances, this is not a case in which it can be said that Mrs. Austin is not bound by his contract, or in which she can claim exemption from the legal consequences of his acts because she had not actual knowledge of them at the time, for he was acting within the general scope of his business which she had entrusted to him. In such case she is bound by his acts, though done without her knowledge, and contrary even to her instructions. The authority of a general agent cannot be limited by any private instructions, unless they were known to the person dealing with him. Thus in *Lobdell v. Baker*, 1 Met. 193, it was held that, a principal was bound by the representations of his general agent, although they were made contrary to the principal's express instructions, unless such instructions were known to the purchaser. But the rule is otherwise, in case of particular and special agents, Wild J. observing, that "this seems to be a reasonable rule, which is founded on public policy, and is well supported by the authorities;" Story on Agency 116, notes 122; Smiths Mer. Law 161; 1 Amer. Lead, Cases 550, 553; *Com. Bank v. Norton*, 1 Hill 502; *Davison v. Robertson*, 3 Dow. 219, 229.

We must, therefore, regard the contract for the loan of that money as binding upon the oratrix; as much so, as if it were made with her knowledge; and in that light, that sum should be deducted from this note, as the other has been paid. The oratrix has now knowledge of the particulars of that contract; still, there is no repudiation of it, nor any disaffirmance of the act of her agent. She claims the benefit of the contract, and is now seeking to

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enforce payment of the note by foreclosing the security given for it. The contract, as made by her agent, is thereby adopted and assented to; and she is, and should be subject to all the legal consequences resulting from it. In deducting that amount, no injustice is done to her, but manifest justice is done to the defendant. That \$400,00 note has been paid to her agent, and with it that usurious interest, so that in the decree she has obtained in this case, and in the money paid to her agent, she will receive the whole amount loaned, and the legal interest upon it. That is all which the law will permit her to recover, and all that in equity she ought to receive. It is a common principle that no artifice, devise, or shift shall evade the statute against usury. Lord Mansfield has observed that, it is not in the wit of man to devise it; *Floyer v. Edwards*, Cowp. 114. There is no propriety, therefore, in saying that the scheme adopted on this occasion, which is so readily seen, and so easily effected, shall avoid the statute, and effectually defeat its provisions. By the decree of the chancellor, the amount paid over the actual value of the horses, as found by the master, was deducted from this note, and, we think, that the decree should be affirmed.

 ROLLA GLEASON v. WILLIAM P. BRIGGS.

Statute of frauds. Official neglect. Interest. Book Account.

One L. was indebted to the plaintiff, but had executions in the hands of the plaintiff, as deputy sheriff, for which he had become holden to an amount exceeding L.'s indebtedness. The defendant bought the executions of L., and in part payment therefor, promised to pay the amount L. was owing to the plaintiff, in a settlement of accounts between the plaintiff and himself, and assented to its being charged to him. *Held* that the plaintiff's claim therefor against the defendant was valid, and that the promise of the defendant was not within the statute of frauds.

One T. sent to the plaintiff, as deputy sheriff, an execution in his favor against the defendant, which, at the defendant's request, and upon his promise to pay and indemnify him for so doing, the plaintiff levied upon the defendant's real estate.

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T. sued the plaintiff for not otherwise collecting the execution, and recovered a judgment against him for the amount of the debt, which judgment the defendant paid. T. refused to pay the plaintiff's fees for levying the execution, and the plaintiff then charged them to the defendant. *Held* that it was not a contract for the violation by the plaintiff of his official duty, and that the defendant was liable upon his promise for the fees charged.

Interest upon a debt, payable on demand, will be allowed, after a demand, by way of damage for the delay; and the law will imply a contract to pay it.

An attempt to settle may perhaps be fairly enough regarded as a demand of payment by both parties for whatever should be found due on the other side.

The expense of keeping animals attached, may be deducted from the amount received upon their sale, and a subsequent satisfaction of the attachment liens, by a payment of them by the debtor, will not deprive the officer of his right of retaining the expense of keeping.

Executions and notes may, by agreement, be charged and recovered for in the action on book account.

But a claim for a horse attached and not sold, or returned after a discharge of the attachment, or any claim against a person on account of his official neglect, as a deputy sheriff, cannot, without his consent, be adjusted in the book action.

BOOK ACCOUNT. The disputed items in the plaintiff's account, which were passed upon in the supreme court, were as follows.

Newell Lyons account,	\$33.60
Bal. on execution, S. Churchil v. you,	4.07
Fees on same,	2.38
Bal. on execution, Shepherd v. you,	1.27
Fees on execution, Blodgett v. you and Jones,	2.66
Setting off land at your request, in the case of	
. Thrall v. Briggs et als.,	11.12
Interest,	

The auditors reported that Newell Lyons was a lawyer who, in 1834, was indebted to the plaintiff and had in the hands of the plaintiff, as deputy sheriff, certain executions upon which the plaintiff had become holden, to the amount of \$40.91. Lyons sold these executions to the defendant, who, in part payment therefor, was to pay the plaintiff what Lyons was then owing him for official services, and assented to its being charged to him, and agreed to pay it in settlement of accounts between the plaintiff and himself. The auditors found that said indebtedness amounted to \$22.81, and allowed the first of the above charges, in part, at that sum.

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The auditors found and reported that the items for balances and fees on the executions above mentioned were charged to the defendant, at his request, or by his agreement, and that he never paid them in any other way, and that the charging them to the defendant was treated by the plaintiff, at the time, as a payment of those amounts on the executions.

In reference to the charge of \$11.12, the auditors reported that a Mr. Thrall sent to the plaintiff, as deputy sheriff, an execution in his favor against the defendant and others, which, at the defendant's request, the plaintiff levied upon his real estate, the defendant promising the plaintiff that, if he would so levy it, he would pay him for doing it, and indemnify him generally. The sheriff was sued by Thrall, and made liable for the debt, on account of the plaintiff's not otherwise collecting it; and this judgment against the sheriff the defendant paid. Thrall refused to pay the plaintiff's fees for levying the execution, which were originally charged to him, and upon his refusal, the plaintiff charged them to the defendant. The auditors allowed the charge.

In the spring of 1836, the parties attempted to settle, and the respective accounts of each were brought forward, to which objections were made, and no settlement was effected. The auditors reported that if the parties had then settled, on the same basis which the auditors adopted, there would have been about \$180 due to the plaintiff, and that the subsequent dealings between them, down to September, 1851, would not have materially altered that balance, and that they, therefore, allowed eighteen years interest on that balance, amounting to \$138.40.

The principal items in dispute, in the defendant's account, grew out of an attachment and subsequent sale by the plaintiff, as a deputy sheriff, of several horses and cows belonging to the defendant. On the 22d of September, 1851, the plaintiff took, as the property of the defendant, upon writs of attachment and executions against him, four horses, one colt, thirty-one cows, nineteen two year olds, &c., and afterwards advertised said property to be sold on the 3d day of November, 1851, on the executions in his hands, and some of the attaching creditors, who had not obtained judgments, consented to the sale. On the 3d of November, the defendant gave to the plaintiff a writing, in these words.

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"I hereby agree that the cattle and horses, attached on writs "and executions against me by Rolla Gleason, as deputy sheriff, "may be sold at public auction on the 13th day of November, "1851, provided the same are not sold by me, before that time, for "such notes as will be satisfactory, and which I am to have the "right to do. Richmond, Nov. 3d, 1851."

(Signed)

"WM. P. BRIGGS."

The plaintiff adjourned the sale to the 13th of November; the defendant sold to one Foster, nine of the cows for \$171, for which the plaintiff, at the request of the defendant, took E. B. Green's note, running to himself, and payable at a short day, with interest. On the 13th of November the defendant sold the remainder of the property attached, with the exception of one horse, which does not appear to have been in any way accounted for, which sales amounted, including the Green note for \$171.00, to the sum of \$1,184.20. The plaintiff was at an expense of \$138.54 in keeping the property from the 22d of September to the 13th of November, and including this sum, he paid and satisfied executions against the defendant, which were liens upon the property, with his fees and charges, to the amount of \$833.20, leaving a balance in the plaintiff's hands of \$351.00, including the Green note. There were other liens by attachment upon this property, at the time of the sale, but they were subsequently relieved or satisfied without a resort to it, and, after the removal of all the liens, the defendant had demanded the above balance of the plaintiff. One of the horses taken by the plaintiff, on the 22d of September, and sold on the 13th of November, 1851, had previously been attached by the plaintiff, on a writ in favor of Dutton & Bingham against the defendant, and receipted to the plaintiff by Ransom Jones. On the 13th of November, the plaintiff procured some one to bid this horse off in the name of Jones, which was done at \$87.50. This was done without Jones' knowledge, and he disaffirmed the bid; and the horse went back into the defendant's possession, and remained there until the spring of 1852, when the Dutton & Bingham execution came into the plaintiff's hands, seasonably to charge the property, which the plaintiff again took, and advertised and sold towards the payment of that execution.

At the time of the hearing before the auditors, the plaintiff had

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not completed his returns on the executions which were paid by the avails of said sale, being in doubt how legally to distribute the expense of keeping the property, but he had a full account of the sales, and of said expense, so that he might complete his returns in any way deemed proper, and the auditors, therefore, treated the sale as legal, and the expenses as constituting one item, and did not distribute it to the several cases.

The auditors found a balance of \$301.64 in the plaintiff's favor, without allowing anything to the defendant on account of the horse attached, and not sold, or for the horse bid off in Jones' name, or for the balance of the sales remaining in the plaintiff's hands, after satisfying the liens upon it.

The county court, November Term, 1855,—PIERPOINT, J., presiding,—accepted the report of the auditors, and rendered judgment upon it for the amount reported in favor of the plaintiff.

Exceptions by the defendant.

W. P. Briggs and *C. Linsley*, for the defendant.

——— for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. The claim for what Lyons owed the plaintiff, seems to be a valid claim, upon two grounds. It seems to have been a part of the contract of purchase, of the balance of the executions due to Lyons, that what Lyons owed the plaintiff should be deducted; and we do not see why the plaintiff had not a right to retain that, and only account to the defendant for the balance. And without this, if the defendant consented to have it charged to him, and the plaintiff consented to do this, it would become an original undertaking on the part of the defendant, and Lyons would be released; and this takes it out of the statute of frauds.

The charging of executions or notes, upon account, by agreement of parties, has been repeatedly sanctioned by this court.

In regard to the item for fees, for levying Thralls' execution, upon the finding of the auditors, that the defendant expressly promised to pay the fees, if the plaintiff would make the levy, there can be no question, unless this was the price paid to hire the plaintiff to

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violate a known official duty. If this contract were for mere ease and favor on the part of the defendant, it has often been decided that even a bond is not valid when given upon such consideration. But the court are not satisfied that it was, at the time the contract was entered into, understood by both parties to be a departure from the plaintiff's official duty. It might have been regarded as doubtful whether, under the circumstances, the creditor would not acquiesce in the levy. If he did, it was all very well, and perfectly valid. If he did not, and should recover of the officer, that would leave the land the officer's, by being subrogated to the rights of the creditor, and the defendant's contract virtually was, to pay the amount of the levy and take the land. He has paid all but the fees, and as nothing is said in the report upon that point, we must presume no objection is made upon the ground that the land has not been conveyed to the defendant. If he really, then, now holds the land levied upon, which, but for this contract would have been the plaintiff's, we see not why these fees are not properly chargeable to him.

The interest seems to have been cast upon what the auditors found to be due to the plaintiff in 1836, at the time they met and attempted to settle, and which was fairly enough, perhaps, regarded as a demand or claim of payment upon both sides, for what should happen to be due. And if it had turned out that the plaintiff owed the defendant, at that time, a balance, it would seem just to give him interest, and that is what the auditors did for the plaintiff. The law will always imply a contract to pay interest upon a debt payable on demand, after demand made, by way of damages for the delay. The cases upon this subject may not all be reconcilable, but this is almost the universal rule.

The horse which the plaintiff attached and did not sell or show at the audit, had been returned, could not surely be charged upon book, without showing some consent to such a charge on the part of the plaintiff.

The horse bid off by the plaintiff in the name of Jones, and which went into the defendant's possession, and was finally sold upon his debt, seems sufficiently to explain itself. The sale, unless ratified by Jones, was a mere nullity, and seems to have been so regarded by the parties.

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We do not see why the expense of keeping the stock is not to be deducted from the amount of the sales. For, whether applied by way of return upon the executions, or not, the debts are discharged, so far as executions came into the plaintiff's hands, and for which he has retained money. And as to those liens, which existed at the time of the sale, and have since been paid by the defendant, so that executions never came into the plaintiff's hands, this will not deprive him of retaining pay for keeping.

The only remaining item is one of large amount, and, as it changes the result, is certainly of great importance. It is the balance of money, in the plaintiff's hands, from the sale of cattle attached, after all liens were discharged.

It is claimed that the plaintiff does not hold either the money or Green's note, in his official capacity. As the sale to Green was by the defendant himself, and upon credit, and without the concurrence of the sheriff, according to the decisions in this state, he (the sheriff) would not be liable for the money until collected, if ever, although by the arrangement between these parties, the plaintiff, doubtless, had a right to hold the note for his indemnity, and had he actually received the money, we should probably find no difficulty in making him accountable in this action. But as he did not receive the money, and it is still collectable, and he has never consented to have the note charged to him, we do not see how he is to be made liable, in this action. If liable in any form, it is for not collecting the money, and that cannot be charged on book,

As to the money in the plaintiff's hands, it seems to us to have been an official sale, notwithstanding the debtor waived the full term of advertising. *Burroughs v. Wright*, 19 Vt. 510. We understand that the liens did exist until after the sale, else why did the defendant surrender Green's note as well as the money? They have been since removed. It would clearly seem to be an official neglect, for the deputy, under the circumstances, to refuse to pay back the money. The sheriff is clearly liable for it. The deputy is clearly not liable, as for an official neglect. *Hutchinson v. Parkhurst*, 1 Aik. 258. According to the case of *Tuttle v. Lowe*, 7 Johns, 470, the deputy is liable for the money in his hands, upon an express promise to pay, and not otherwise. None such is proved here. I can find no case where general assumpsit has been main-

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tained against the deputy for not paying over money in his hands, for which the sheriff was liable. It has been held, I think, that he is liable in trover, for not surrendering property attached after the lien is dissolved, but this is a tort, and he is always liable for misfeasance, but not for nonfeasance. And it seems to us an action on book will not lie, until the parties agree it may be charged, or the deputy promises to pay it, which is equivalent. So long as the sheriff remains liable, it would seem that, for mere official neglect, the deputy is not also liable. And although the sheriff be clearly liable, it was never claimed that he was liable to this kind of action. We certainly could not hold that this action will lie for official neglect. An action for money had and received sometimes lies when the money is obtained by force or fraud, but book account will not lie. And if it could be shown that assumpsit, as for the money, will lie both against the sheriff and the deputy, book account will not lie. *Hopkinson v. Sears*, 14 Vt. 494, was an action for money against a sheriff; but the money was obtained wrongfully in that case.

Judgment affirmed.

JOSEPH HATCH v. THE VERMONT CENTRAL RAILROAD COMPANY.

Possession of the highway and of the premises adjoining. Action for public nuisance. Evidence.

The occupation of premises on the line of a highway for a period of twenty years or more, without any paper title affords no presumption, as matter of law, that the possessor's title extends beyond the limits of his actual possession or to the centre of the highway.

Nor can a person acquire a title to any portion of the highway by an occupancy of it with his wagons and carriages and those of his customers, if such occupancy is not adverse to the rights of the public, or under some other claim of right to the premises than as a highway.

The decision in *Hatch v. Vt. Central Railroad Company*, 25 Vt. 49, recognized.

No action on account of a public nuisance can be sustained by a person who has not sustained special damage from it.

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In an action against a railroad company, who are not made liable for consequential damages, occasioned by the construction of their road, to persons whose lands are not taken, evidence as to the manner in which they have constructed their road upon premises not belonging to the plaintiff, is inadmissible, if it does not tend to show that the company have exceeded their powers or have been negligent in the exercise of them.

A certified copy, from the records of a town, of what purports to be the location of a railroad in that town, is admissible in evidence for the purpose of showing that such a paper was on record.

ACTION ON THE CASE to recover damages sustained by the plaintiff in consequence of the construction by the defendants of their railroad. Plea, the general issue; trial by jury, November Term, 1855,—PIERPOINT, J., presiding.

On the trial the plaintiff introduced evidence tending to prove that, at the time of the injury complained of, he was the owner, and in the occupancy of a large and valuable building at the corner of Main and Water streets, in Burlington, in which he carried on a large bakery and grocery; and that said building and grounds were of the value of seven thousand dollars; and that the defendants built an embankment of the height of three feet or more across Main and Water streets, and adjoining said bakery and store, and within twelve feet of the corner of the same, without taking any of the plaintiff's land; and offered evidence to prove that the defendants could and might, with equal convenience to themselves and the public, at an additional outlay of fifty dollars, have carried their track at least fifteen feet further from the plaintiff's building, and thereby have reduced the damages to the plaintiff at least one thousand dollars; and that the defendants might and could have so altered the grading of said railroad at the crossing of said Main and Water streets, without any additional expense, and without any temporary or permanent injury to themselves, as to have the said railroad track cross said Main and Water streets at the grade of said streets, instead of three feet above; and that the crossing said streets at the grade of said streets by the said railroad track would have been a trifling injury to the plaintiff's property, compared to that now sustained by him; but, the testimony being objected to, the court excluded it.

The plaintiff, to show title, gave evidence that he had been in possession of said building more than twenty years, claiming all the time as owner, and that said building so used as a bakery and

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grocery as aforesaid, was built on the line of, the street, and that, during all the time of his said occupancy, his wagons, carts and carriages, and those of his customers used and occupied said Main and Water streets adjoining and before the doors of said building; and claimed that from such occupation and possession the law would presume his title extended to the middle of said Main street and the middle of said Water street; but the court decided that the plaintiff's right was limited by his enclosure or building, and would give him no rights beyond the limits of the highway, as no paper title had been shown.

The plaintiff introduced evidence tending to show that the basement floor of his bakery was on a level with the grade of Main and Water streets, and that there was a door of entrance both on Main and Water streets, and that the water, before the building of said railroad, flowed away from the building and towards paved water courses constructed for the purpose of conducting said water along said streets, and that, after the building of the railroad, access to said doors of entrance was nearly or quite impracticable for teams; and that the water course for the passing of the water coming down Main street was insufficient to pass the water, and that in hard showers it was obstructed and remained in the street before the plaintiff's doors; and that before the building of said railroad the water coming down Water street was carried by an open paved drain near the centre of the street, but that in building said railway across said Water street, the railway was raised above the paved drain, and no water course left, and that thereby the water was obstructed and thrown upon the street, near to and in front of the plaintiff's door; and that it so remained for a considerable time, making a mud-hole in which swine were accustomed to wallow.

The plaintiff also offered evidence tending to show that the street commissioners of Burlington proposed to Gov. Paine, then president of the defendants, that the town of Burlington would give fifty dollars if the defendants would pay fifty dollars more, and fill up said streets adjoining the plaintiff's bakery, and make suitable water courses for carrying off the water; but that Paine declined, but offered to pay twenty-five dollars, which was only a small part of what it would cost to make said streets convenient, with suitable water courses.

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The evidence introduced by the defendants tended to prove that the road did not obstruct the water courses, but that they remained open, as before the road was made.

The plaintiff requested the court to charge the jury that it was the duty of the defendants, in constructing the railroad across said streets, in front of, and near said building, not only so to construct their road as to do as little damage as they could to the plaintiff, without materially injuring said railroad, but that they were bound to incur any reasonable expense that might be necessary to restore the water courses and streets to their former state of usefulness, and that this was not merely a duty to the public, but that any property holder adjoining the crossing of said streets, who was injuriously affected by the defendant's neglect, would be entitled to redress.

The defendant offered in evidence a certified copy of the records of the town of Burlington of what purported to be a location of the defendants' railroad in Burlington, to the admission of which the plaintiff objected, but the objection was overruled and the paper admitted.

The evidence tended to prove that the railroad constructed in front of the plaintiff's bakery was constructed upon the public highway, and was a part of the first and only railroad constructed by the defendants in the town of Burlington, and had been in constant use by the defendants ever since its construction.

The plaintiff insisted that the defendants had not made a sufficient defense to the plaintiff's action, as there was no evidence that, in the location and construction of said railroad, the requirements of the charter of the defendants had been complied with.

The court instructed the jury that the copy of the records of Burlington, introduced by the defendants, was no evidence of the fact that the location of the road was made by the directors of the company, but if they found, from other evidence in the case, that the road, the construction of which was complained of by the plaintiff, was a part of the first and only railroad that the defendants had constructed in the town of Burlington, and that the same had been used by the defendants from the time of its construction hitherto, it would be a sufficient defense to the action, unless it appeared that in the construction or use of the road, the defendants had

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done what, by law, they were not authorized to do, or had omitted to do what the law required them to do, and that the plaintiff had suffered damage by such act or omission; that the defendants had a right to determine upon what line and upon what grade they would construct their railroad, and for such determination and construction they were not responsible to the plaintiff in this action; and if the defendants, in good faith, constructed the road in front of the plaintiff's premises, upon the line and grade they did, they were not responsible in this action, unless they obstructed the water course or courses crossing the railroad, so as to cause the water to flow upon the premises of the plaintiff; if they did so obstruct the water course, the plaintiff was entitled to recover all the damages he had sustained thereby; or, if the defendants, in forming the embankment in front of the plaintiff's premises, through carelessness, negligence, or wanton disregard of the rights of the plaintiff to pass to and from his premises, unnecessarily obstructed or hindered him in so passing, the defendants would be liable in this action for such damages as the plaintiff had thereby sustained; that although the embankment made by the defendants might have caused water to stand in the highway in front of the plaintiff's premises so that a hog could wallow in it, the defendants were not, on that account, liable in this action, unless the plaintiff proved that he had sustained some special damage in consequence thereof, and that there was no evidence tending to prove any such special damage.

Verdict for the defendants. Exceptions by the plaintiff.

D. A. Smalley and C. Linsley for the plaintiff.

Roberts & Chittenden for the defendants.

The opinion of the court was delivered by

BENNETT, J. We think the court below were right in limiting the plaintiff to the line of the highway. The case, it is true, shows that the plaintiff's store was built upon the line of the highway, and that he had been in the possession of the premises for more than twenty years; but no title deeds were put into the case, and we cannot presume, as matter of law, in the absence of proof, that the

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plaintiff's title went beyond his actual possession. Although the case shows that the highway, contiguous to the plaintiff's store, was used by him and by his customers for their wagons, &c., yet there was no pretense that such occupancy was adverse to the rights of the public, or under any claim of right, except as a common highway, and, as such, to be used by any one who had occasion to use it; and there is nothing in the case to show any improper use of the highway by the plaintiff any more than by any of his customers. The case then does not call upon us to decide what would have been the rights of Hatch, if any, in case it had been shown that he owned the fee in the land, to the centre of the highway. It will be time enough to decide such a case when one arises. Unless the plaintiff can stand upon the ground of negligence or want of proper care in the defendants, in the construction of their road, the principles of the case were settled by this court in their previous decision; 25 Vt. 49. The jury, by their verdict, have negatived all negligence or a wanton disregard to the rights of the plaintiff, in raising the embankment in front of the plaintiff's store; and have found that the plaintiff's right of ingress and egress from his store has not been unnecessarily obstructed.

The plaintiff also had the benefit of the instruction to the jury, that, if the water course crossing the railroad was obstructed so as cause the water to flow back upon the plaintiff's land, to his injury, he was entitled to his action.

It is clear the court was right in telling the jury that the plaintiff could not recover, although the defendants caused the water to stand in the highway in front of his store, without proof of *special* damage. If the standing water became a nuisance to the public, the remedy would be by indictment, and not by private action, unless in case of *special* damage. The plaintiff has no ground to complain of the charge of the court in any respect.

We are now required to see if any errors were committed in the trial of the cause, in the admission or exclusion of evidence, to the injury of the plaintiff. It has been settled, even by our own courts, that it is competent for the legislature to grant the right of building a railroad without requiring compensation to be made to land-owners for *consequential* damages in cases in which no land has been actually taken for the use of the road; and, as the legislature

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have not required compensation to be made in a case like this, for consequential damages, the plaintiff must be without redress so long as the company keep within their powers, and are not guilty of negligence or a want of care in the exercise of their powers under their charter. Testimony, then, to be admissible, should tend to show that the company have exceeded their powers, or have been negligent in the exercise of them. The offer made to Gov. Paine, the president of the company, by the street commissioners, to fill up the streets adjoining the railroad and the plaintiff's bakery, and the reply of Gov. Paine to it, was properly excluded. It had no bearing upon the question of negligence in the defendants while engaged in the execution of their powers, and besides, the declaration of Paine would not be evidence against the company, unless made by him relative to something within his agency.

We see no good objection to the admission of a certified copy of what purports to be a location of the road, from the records of the town of Burlington. It is not stated for what purpose it was offered, or for what purpose it was admitted.

It is clearly evident that such a paper was on record, and the jury must have found, under the charge of the court, that the defendants have constructed the road, and have ever since used it. If it was necessary for the defendants to prove a location, this was proof enough of it; and the theory of the plaintiff's action goes upon the ground that the road was located in the very place where it now is, and the complaint is, that the location and the construction of the road were both improper.

The judgment of the county court is affirmed.

Sherman v. Blodgett.

EBENEZER SHERMAN v. LUTHER P. BLODGETT.

Evidence.

A witness may be inquired of, and may testify as to his *opinion* respecting the solvency of a person, when he has stated the facts and means of knowledge upon which his opinion is founded.

ACTION ON THE CASE against the defendant for having, as sheriff, taken insufficient bail on mesne process. Plea, the general issue; trial by _____, November Term, 1855,—PIER-POINT, J., presiding.

The plaintiff having made out a *prima facie* case, the defendant introduced testimony to show that the bail was sufficient at the time it was taken. A witness stated that the bail, at the time of the service of the writ which the bail endorsed, owned certain real estate and personal property, which he described, and his means of knowing the then situation and circumstances of the bail. The counsel for the defendant then asked the witness *what, in his opinion, from his knowledge of the said Ahira, (the bail,) and his affairs, was the value of said Ahira's property over and above what he owed, at the time the defendant served the writ?* To the question so put by the defendant's counsel, the counsel for the plaintiff objected. The objection was overruled by the court, and the witness answered the question, to which decision the plaintiff excepted.

D. A. Smalley and *C. Linsley* for the plaintiff.

J. Maeck for the defendant.

BY THE COURT. We have no doubt the evidence objected to was properly admitted.

The solvency of an individual is a matter resting somewhat in opinion; and, in the present case, the witness had stated what property the bail owned at the time he entered bail, and his means of knowing the situation and circumstances of the bail; certainly there could then be no objection to his giving his opinion from his knowledge of the bail, and of his affairs, what he thought he was worth.

Judgment affirmed.

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MERRILL, TOWNSEND & BOYNTON v. LEVERETT B. ENGLSEBY,
trustee of JACOB C. HAWLEY; ASAHEL PECK AND OTHERS
claimants.

Practice. Void, or inoperative and defective assignments; how remedied. Trustee process. Statute of frauds.

Upon exceptions to a decision of the county court in reference to the liability of a person summoned as a trustee, by which his disclosure is made a part of the case, and no evidence appears to have been introduced in contradiction of it, the statements contained in the disclosure will be regarded as facts found by the county court.

An assignment which is defective, on account of its containing a resulting trust before providing for all of the assignor's creditors, may be remedied by a new assignment, and probably, without resort to a new assignment, by a mere declaration of trust in favor of all of the creditors.

The word "void" in the act of 1843, declaring certain general assignments void, &c., construed as implying only inoperative or voidable.

An assignment which is inoperative under that statute, on account of its generality, may be cured by a new assignment, less general, in which a substantial portion of the assignor's estate is omitted and left exposed to attachment.

An assignment which is void or inoperative under that statute will, if assented to by the creditors, become operative and binding upon them.

Under the provision of the statute allowing the trustee to retain or deduct his demands against the principal defendant from the effects in his hands, he may retain whatever, before the service of the trustee process, he becomes legally bound to pay to any third party on account of the principal defendant.

The promise of an assignee to keep the assigned property for the benefit and security of certain sureties of the assignor is an original undertaking, and not within the statute of frauds.

TRUSTEE PROCESS. The following facts are stated in the disclosure of the trustee, or appear from the papers attached to it.

On the 8th day of December, 1851, the principal defendant executed and delivered to the trustee an assignment of all his goods, chattles, moneys, debts, accounts and demands, and all the real estate he owned, or was interested in, in the town of Burlington, in trust for the benefit of certain enumerated creditors, who were divided into four classes, and a distinction by way of preferences made between the different classes. On the 9th of the same December, he executed and delivered to the trustee another assignment of the same property, and in all respects like the first, except that

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it contained a provision, after the payment of the creditors enumerated and divided into said four classes, for the payment of all of the assignor's other creditors. On the 10th of the same December, he executed and delivered, for the same purposes with those expressed in his assignment of the 9th, an assignment, to the trustee, of certain debts due, notes and demands, and articles of personal property specified in schedules annexed to the assignment. And on the 13th of the same month he executed and delivered to the trustee a conveyance of all of his real estate in the town of Burlington upon the same trusts and for the same purposes expressed in the last two preceeding assignments. These assignments were marked and referred to in the order of their dates as assignments A, B, C and D. The trustee took possession of most of the property upon the execution of the first assignment, and there was no formal surrender of that, or of the second assignment, upon receiving either of the subsequent ones. There was a horse, sleigh, and two wagons and sundry accounts, most of which were for less than ten dollars, which were not included in the third assignment, but the trustee received a general bill of sale of the horse, sleigh and wagons, dated December 13th, 1851, under which he took possession and disposed of them, and their proceeds went into, and were distributed with the proceeds of the property sold under the assignment. Previous to the service of the trustee process, the trustee had paid some of the creditors specified in the first three classes, and had notified those specified in the fourth class that he was prepared to pay them nine per cent upon their claims against Hawley, and some of them had accepted of that dividend. The third class of creditors under the assignments were sundry persons who were to be indemnified and saved harmless from all liabilities they had incurred as sureties and endorsers for the assignor, among whom were Asahel Peck and the other persons who appeared as claimants in this suit; and the trustee disclosed that he was notified by the said Peck, in January, 1852, not to surrender to Hawley the property received under the assignments.

At the March Term, 1855, Asahel Peck, Horace Wheeler, James Morse, Seth Morse and Myron Morse appeared as claimants and filed allegations, averring that, at the time of the making of said assignments, they were respectively liable as sureties for the principal defendant to a large amount,—that the assignment was

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made to secure them for said liabilities, and that, before the service of the trustee process in this suit, they accepted of the assignment and adopted the assignee as their trustee, and thereby acquired a lien upon the property in his hands, and, relying upon the same, had paid most of the demands, whereon they were liable, &c. An objection was made to the said Peck being allowed to appear as claimant, for the reason, (as alledged,) that he had not such an interest in the matter as entitled him to so appear; but the county court, May Term, 1854,—POLAND, J., presiding,—overruled the objection, to which the plaintiffs excepted.

The allegations of the claimants were then traversed, and upon the trial of the issue thus formed, at the November Term, 1855,—PIERPOINT, J., presiding,—it appeared that the said Peck was, at the time the several assignments were made, surety for the defendant Hawley, to an amount sufficient to absorb the funds in the trustee's hands, and that he had since paid such liabilities as surety for the defendant; it also appeared that said Peck, before the first assignment, requested the defendant to furnish him security, which the defendant promised to do by leaving with his (Peck's) clerk, that day, good notes sufficient for that purpose, which promise was made the 8th day of December, 1851, as Peck was about leaving for Hydepark: and that upon his return the defendant informed him that he had put into the hands of Englesby property sufficient to secure him (Peck) and the defendant's other endorsers.

Peck immediately called on Englesby and requested him to hold on to the property for his (Peck's) security, and Englesby agreed so to do; but said Peck did not, at the time, nor did Englesby suppose that Peck would be entitled to any more than his proportion with the other sureties of the defendant; and after that Englesby applied to Peck and received from him advice and direction in reference to the management and disposition of the property.

Thereupon the court adjudged that the trustee was not liable, and that he recover his costs; to which decision the plaintiffs also excepted.

G. F. Edmunds and Roberts & Chittenden for the plaintiffs.

The first assignment, under which the property passed into the hands of the trustee, was void not only as a *general* assignment but as containing a resulting trust; and all the subsequent assignments

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were void, without reference to the first, on account of their generality.

As the paper "A" conveyed *all* the property of Hawley, and was not attempted to be cancelled or revoked, the subsequent instruments conveyed nothing, and were of no effect as against the suit of the plaintiffs; 10 Paige 210, *Brownell v. Curtis*; or, at most, they merely amounted to new declarations of trust. Neither Hawley nor Englesby could revoke it; the creditors provided for, had acquired an interest in it. It was completely binding until it should be judicially condemned, at the suit of a creditor; 17 Vt. 297.

The two last instruments, (had there been no others,) were clearly a general assignment. They do not purport to be partial and Hawley had no other property, save that mentioned in the disclosure; 17 Vt. 390, *Dana v. Lull*.

The claimants were improperly cited in, and had no right to appear. The statute, (Comp. Statutes 263, § 53,) neither in letter or spirit applies to such a case.

The proof, under the allegation, merely amounted to an acceptance of the assignment;—Hawley has given no other order or direction as to the property, than the assignments; and all the promise of Englesby to Peck amounted to, was merely, (as both understood it,) that he would hold the property under the assignments for the benefit of Peck and the other creditors in his class.

Neither party supposed they were entering into any new contract or obligation, and the promise was verbal. See *Hazeltine v. Page*, 4 Vt. 54; 19 Vt. 98, *Barney v. Douglass*; *id.* 644, *Strong v. Mitchell*.

Such being the facts, the application of Englesby to eminent counsel for advice and direction in the matter, created no new right; *Goodell v. Williams*, 21 Conn. 419.

The trustee, admitting the receipt of the property, must be held, unless sufficient matter in discharge appears on the record; 2 Met. 376; 17 Pick. 435; 21 Pick. 160.

L. B. Englesby and Underwood & Hard for the trustee and claimants.

The papers marked A, B, C and D, are not to be construed together; as it is obvious that the papers C and D were made to

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supersede A and B; and hence A and B are no part of the contract contained in C or D.

The assignment C, upon its face, purports to be a specific or partial assignment; and the claims to be secured by it are *bona fide*. It is the duty of the plaintiffs, who seek to overthrow the assignment upon the ground that it is, in fact, a general assignment, to prove this; *Mussey et als v. Noyes et al.*, 26 Vt. 474-5.

The trustee's disclosure and the papers A and B, do not, *ex vi termini*, prove the assignment, *as a matter of law*, to be general within the statute. The court were authorized to give them such weight as they thought proper, and upon this matter this court cannot revise the finding of the county court, any more than they could the verdict of a jury; *Cahoon v. Ellis and Tr.* 18 Vt. 500; *Emerson v. Bradley and Tr.* 18 Vt. 586; *Fish v. Field and Tr.* 19 Vt. 141.

The agreement on the part of Hawley to secure Peck in his absence, and his subsequent communication that he had done so; and the fact that Peck thereupon went to Englesby and requested him to retain and dispose of the property for his benefit, and Englesby's agreeing to do so, and then disposing of the property under Peck's advice and directions, is sufficient to show that Peck was the principal, and Englesby his agent; and that Peck had a clear vested interest, which he could enforce at law or in equity. This was the same in effect, as if the whole property had been put into Peck's hands to secure him; and establishes Peck's claim independent of the assignment.

If the assignment is void under the statute, certainly the creditors would have a right to make any other arrangement to secure themselves; and the facts clearly tend to show, and the court are authorized to find, that Peck was proceeding independent of the assignment; and this court will so treat it, if that is necessary to sustain the decision of the court below; *Wheeler et al v. Evans and Tr.*, 26 Maine 133; *Leyro v. Staples*, 21 Maine 252; *Fletcher v. Clark*, 29 Maine 485.

The opinion of the court was delivered by

REDFIELD, CH. J. In regard to the construction which is to be put upon the case, there seems to be some difference of opinion

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among the counsel. But it seems to us that, as the disclosure is made part of the case, with the accompanying documents, and as no evidence seems to have been introduced in contradiction of it, and as it evidently must have formed the basis of the decision, or of any understanding decision upon the subject, it must be regarded as a part of the case here, and the statements, as facts found; we feel so confident such must have been the understanding of the judge, allowing the exceptions, that if we adopted any different view of the legal construction of the exceptions, we should feel bound to give an opportunity to have the exceptions revised by the judge.

In this view of the case, it seems to us all the assignments must be regarded as void or inoperative, under the statute of 1843. We should not find any difficulty in adopting the view of the court, in *Ingraham v. Wheeler*, 6 Conn. 277, and thus conclude that the latter assignment, C and D, which is evidently but one transaction, is not vitiated by the former assignments, A and B, which were never rescinded or formally surrendered. These instruments, which, in the language of the statute, were void as to creditors of the assignor, by reason of being general, and one of them also by reason of a resulting trust before providing for all the creditors, probably were not affected with any taint or vice which rendered them incurable. They were, in a more strict sense, imperfect, or defective; and were, on that account, *voidable* by the creditors of the assignor, as is said in *Edwards v. Mitchel*, 1 Gray 239, by Shaw, Ch. J., "such conveyance is not absolutely void, but voidable only by creditors." And although our statute of 1843 uses the term "void as to creditors," it is obvious nothing more is intended, than inoperative, or voidable. It is more like the statute of frauds, by which certain contracts are made of no obligation unless in writing. They are only defective in this particular. It is a further formality, which is made requisite by the law. This may be done at any time, and it is not needful to wipe out the former ineffectual contract. So, too, in regard to this assignment, the resulting trust, without provision for all the assignor's creditors, was an omission which the law would not sanction, and which enabled the creditors to avoid it. But the assignment B supplied this defect by providing, in terms, for the payment of all the assignor's

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debts. This was not only allowable, but it was certainly commendable, and we see no reason why it might not be done by a mere declaration of trust in favor of all the creditors, in addition to the former assignment, without making the whole paper anew. So, too, in regard to the generality of the two first assignments, it was a fact which made the whole contract voidable or inoperative, as to the creditors; but it was a defect which may be cured by excepting some substantial portion of the estate, and leaving it open to attachment. And the fact, that two additional papers were made transferring the same property with certain qualifications, and less general forms of conveyance, shows very clearly that it was the purpose of the assignor and the trustee, to abandon the former contracts, and to make one in conformity to this provision of the statute. But, from the disclosure of the trustee, we do not think it could fairly have been found by the county court, that any substantial part of the property was omitted, or that it was in any such state, being conveyed to the trustee or assignor by a cotemporaneous bill of sale, as to leave the assignment anything but a general assignment, within the decision of this court in *Mussey v. Noyes & Co.* 26 Vt. 462.

The only remaining question in the case is, whether the assignment was capable of being made operative as to such creditors as assented to it, and thereby make the assignee their trustee. After some hesitation, we are compelled to believe, notwithstanding the apparent incongruity of admitting that a contract of assignment, void or voidable under the statute, may be so far affirmed by the creditors themselves, as to be binding, not only upon themselves, but good as against the other creditors, as to whom it was originally void or voidable, that the proposition is maintainable upon the soundest principle.

This is certainly the doctrine maintained in some of the Massachusetts cases referred to in argument, *Russell v. Woodward* 10 Pick. 408; where it is assumed that, as fast as creditors become parties to a deed of assignment for the benefit of creditors, the trust in their favor is made operative, even against attaching creditors who are not parties, and who are, by consequence, not bound by the assignment in its original form; *Edwards v. Mitchel*, Supra, and other cases, 1 Gray.

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And upon careful reflection, I must say that, such a doctrine seems to me altogether consonant to the statute, to the strictest principle, and every way salutary in its operation.

It is certainly not uncommon, where a contract or proceeding is in terms declared void, as to particular persons, to construe this as synonymous with voidable or inoperative. This is one of the ordinary significations of the term, and more natural than any other, when applied to a subject matter of this kind. These assignments are made inoperative, or in popular language void, as to particular persons. It is obvious, if all the creditors assent, the defect is cured. It could not, with any show of reason, be claimed that, if all the creditors became parties to the instrument, whether by deed or parol, that they would not be bound by it, or that they might, after the trustee had gone on in faith of the arrangement, and collected the fund, and was ready to distribute, any one or more of them, recede from their contract, and hold the property by attachments. This ought not to be so. As is said in *Edwards v. Mitchell*, the principle, *volenti non fit injuria*, applies to such assent. And if the assent of all makes it binding, it is difficult to see why the assent of any less number must not have the same effect, as to them. And this making it binding upon these creditors, it is binding upon the other creditors, if it be such a disposition of the effects as the creditor has a right to make.

The contract, here relied upon, is nothing more than the assignment of property, for the security of certain sureties who, in faith of this assignment, have assumed the debts and paid them. This is certainly such a contract as the law recognizes. It is nothing more than preferring certain creditors, by way of mortgage or pledge of personal property. And the fact that it is done, as to the debtor, by this instrument which, until assented to by the creditors, is voidable by them, will make no difference. It is good to divest the debtor of the property; and, when assented to by the creditor, it is good as to him, and binds the trustee to retain the property, and faithfully to execute the trust, unless his contract is within the statute of frauds; and we have no difficulty upon this point. The undertaking of the trustee is an original undertaking, upon a new consideration, and, in no sense, for the debt of another. He promised to keep the property for the claimants security. Nobody else

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had assumed any similar undertaking. This was not a collateral promise. If it were, a third person who undertakes to keep property of one person, to save a debt to another, could never be called to an account, unless the undertaking was in writing. But no one ever entertained any such belief. There is no duty upon the trustee which is not new and original, and without any other similar duty upon another, to which it is collateral. The case of a trustee who owes a debt to the principal debtor and promises, by parol merely, and without any new consideration, or being released by the principal debtor, to pay it to the claimant, is certainly not, in any sense, analagous to the present.

It will be obvious, that the view here adopted is possibly, to some extent, at variance with one line of argument adopted by me, in my opinion in *Mussey v. Noyes & Co.* But I have no occasion here to vindicate the correctness of what I may have said in that case. I adopted the view of the New York cases upon that subject, as I there say, contrary to my convictions of the justice and propriety of the case; and if the view we now take is, in any sense, in conflict with any of the views there put forth, which is not altogether certain, I must say, that the New England cases upon this subject, to the extent necessary to be here adopted, seem to us altogether sound. And had precisely the same view been taken of the subject in *Noyes v. Mussey*, the result must there have been the same, in all respects, that it was.

This case may very properly be decided upon the views adopted in *Bradley & Co. v. Dow & Trustees*, one year since, in this county, that as the plaintiffs here attempt to charge the trustee under the statute, they recognize the assignment from the debtor to him, as creating a valid trust, sufficient to enable him to hold the property under the statute; and while they attempt to charge the trustee under the statute, they must be content to allow him all the rights which the statute accords to him, one of which is to retain enough to pay what the principal debtor owes him. And no question has ever been made, that he might, under this provision, retain any amount of property or money which he had become legally bound to pay to any third party, on account of the principal debtor, before the service of the trustee process.

It would seem, from the finding of the court upon the issue

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joined, that a sufficient trust, in favor of the claimants, was created by the contract of the parties, altogether independent of the assignment, to bind the trustee to hold the property for them. But we think it not very material, whether the trust is under the assignment, or independent of it. The creditors, all of them, so long as they acquiesce in the doings of the assignee, ought to be bound by it; and they must also be bound by any new and legal obligations which the assignee shall assume after the assignment, and before the service of the trustee process as much as by his proceedings under the assignment.

We have not been able to discover any sufficient reason, why the decision of the county court, in admitting the claimants to become parties to the suit, was not in strict compliance with the statute. "If it shall appear that any goods, effects or credits in the hands of any supposed trustee are claimed by any other person, by force of an assignment of the principal debtor, or otherwise, the court may permit such claimant to appear."

Judgment affirmed.

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Guaranty. Proof of notice of acceptance, &c. Construction and requirements of, &c., &c. Discharge of, &c.

Testimony showing the object for which a guaranty was given, that the guarantor was present when it was delivered, and knew of a purchase of goods which the principal made under a contract contemplated by the guaranty, the guarantor's acquaintance with the business of the principal, and his general knowledge respecting the business transactions between the principal and the party to whom the guaranty is addressed, is admissible for the purpose of proving notice to the guarantor of the acceptance of the guaranty, and of the transactions of the other parties under it.

Notice to the guarantor of "*about the amount*" of the advancements which are made to the principal, on the credit of the guaranty, is all the notice which, in this respect, need be given.

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Technical rules are not to be resorted to in the construction of a guaranty where the meaning of the parties is plain and obvious.

The defendant promised the plaintiffs that if they would furnish N. with merchandise "upon commission or otherwise," the defendant would be accountable for all N.'s contracts and engagements, and, if he did not fulfill them as agreed, the defendant would guarantee the payment thereof. *Held*, that the defendant was liable, under such a guaranty, for merchandise which the plaintiffs made a direct and absolute sale of to N.

Held, also, that, under such a guaranty, it was not necessary that payment should first be demanded of the principal, and notice of his default be given to the guarantor, for the purpose of rendering him liable.

Where a guaranty is absolute and binds the surety to the fulfillment of the principal's contract unconditionally and in general terms, no demand of payment of the principal and notice of his default is necessary to charge the guarantor.

The defendant informed the plaintiffs that N. was desirous of obtaining goods upon a credit, and guaranteed the fulfillment of N.'s agreements with the plaintiffs according to his contracts. A contract was thereupon entered into by which the plaintiffs agreed to furnish N. certain goods, to be paid for by him from time to time, but with a provision that the goods should be owned by the plaintiffs until they were paid for. *Held*, that this was a conditional sale upon credit, and within the fair scope of the guaranty.

The contract provided that N. might pay for the goods in certain kinds of barter, and at the expiration of the year return the goods on hand at a certain discount; and that his indebtedness under a former contract, for which the defendant was liable under a previous guaranty, was first to be paid. *Held*, that these stipulations, not operating to the injury of the defendant, did not prevent or discharge his liability; nor would it be affected by a want of notice of N.'s right to return the goods.

The plaintiffs, after the default of N., attached and sold his goods, including those which they had sold him, and applied the avails in part satisfaction of their claim; and they received from N. his note payable on demand, secured by mortgage, as collateral, and not to be credited until paid, and upon which nothing had been paid; and they had also purchased, in the name of a third person, a prior mortgage upon the same premises, and caused it to be foreclosed, but the time for its redemption had not expired. *Held*, that neither of these acts discharged or affected the liability of the defendant as guarantor.

ASSUMPSIT upon two guaranties. The cause was, by the agreement of the parties, referred; and the referee reported a balance in favor of the plaintiffs of \$1,005.77, including interest, together with the following facts found and decisions made by him.

The claims of the plaintiffs were founded upon two guaranties signed by the defendant, dated May 16, 1851, and June 17, 1852, and were for merchandise furnished T. W. R. Nichols, upon contracts signed by the plaintiffs and T. W. R. Nichols. The guaranties and contracts were as follows.

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"*Burlington*, May 16, 1851.

"Messrs. M. Noyes & Co.: Gentlemen,—If you will furnish T. W. R. Nichols with merchandise and tin-ware, upon commission or otherwise, I will be accountable to you for all his contracts or engagements, as you and he may agree, and in case he does not fulfil them as agreed, I will guarantee the payment thereof.

"IRA J. NICHOLS."

"*Contract made and concluded, by and between Morillo Noyes & Co., of Burlington, Vt., on the first part, and Timothy W. R. Nichols, of Essex, Vt., of the second part.*

"The party of the first part covenant and agree to furnish, from time to time, a good stock of merchandise and tin-ware.

"The party of the second part covenants and agrees to and with the party of the first part to buy from the said first party all the merchandise and tin-ware the said second party may want, for the term of one year from the date hereof, at cash prices with interest from the date of the bills payable along, from time to time, as the said second party may collect his dues and obtain money; the indebtedness at no time to exceed twelve hundred dollars, except by special consent of said first party.

"And at the expiration of one year, the said first party agree, (if said second party so desire,) to receive back *all articles*, not damaged, which the said first party may have delivered, by the said second party making a discount therefrom of 10 per cent.

"If the said second party chooses to pay in any barter (such as the said first party are in the custom of receiving) the same is to be placed to the said second party's credit at its cash value.

"It is understood that the said Nichols is to continue in business for one year, and do all that he can advantageously.

"*Burlington, Chittenden County, State of Vt., this 19th day of May, 1851.*

"M. NOYES & Co.,

"TIMOTHY W. R. NICHOLS."

"June 17th, 1852.

"Messrs. M. Noyes & Co., *Burlington*: Gents,—T. W. R. Nichols being desirous of obtaining, from time to time, goods upon a credit, now I hereby guarantee to you the faithful and complete

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performance and fulfilment of said Nichols' agreements with you, according to his contracts; and I hereby waive all notice of your acceptance of, and your action under this guaranty.

"IRA J. NICHOLS."

"Contract made and concluded this 18th day of June A. D. 1852, by and between M. Noyes & Co., of Burlington, of the first part, and T. W. R. Nichols, of Essex, of the second part.

WITNESSETH;

"That the party of the first part, promise and agree to furnish a good assortment of goods, wares and merchandise, from time to time.

"The said second party, promises and agrees to purchase from said first party during the term of one year, all the goods, wares and merchandise the said second party may want, which is in said first party's assortment, at cash prices with interest from the dates of the respective bills; and payable from time to time as promptly as payments can be made, said second party promising and agreeing to use his best endeavors to get ready pay, and collect all debts as soon as may be. Said first party can limit the amount of the second party's indebtedness, and, it is hereby expressly agreed and understood that said first party shall own, till paid for, all goods, wares and merchandise delivered upon this contract as absolutely as if in their own possession.

At the expiration of one year, the said second party has the privilege of returning unto the first party, whatever goods, wares and merchandise there may be remaining, delivered under this contract, if not soiled or in any ways damaged, by the deduction of 10 per cent being made thereon.

"The second party can pay in barter, such as the first party is in the habit of buying, at any time, by making the same at cash prices.

"The said second party shall at all times keep up, in some good responsible company, a fair reasonable insurance upon the goods, wares and merchandise, for the benefit of the first party; and shall continue said business efficiently and perseveringly for the term of one year, disposing of all the goods, &c., that the said second party can advantageously.

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"It is agreed and understood, that the said second party's present indebtedness to said first party shall be paid before payments are applied upon this contract.

"M. NOYES & Co.,

"T. W. R. NICHOLS."

The guaranties were duly executed, delivered and accepted; due notice was given of such acceptance, and the contracts between the plaintiffs and T. W. R. Nichols were duly executed between the parties relying upon such guaranties; and the merchandise, furnished by the plaintiffs to T. W. R. Nichols, was furnished upon the strength of said guaranties.

The amount of merchandise furnished by the plaintiffs, under the first guaranty, was \$1,429.77; to which add for balances of interest from the dates of the bills, \$120.03, making the whole debit side of the plaintiff's claim upon the first guaranty amount to \$1,549.80. The amount of credits to apply, in the first instance, upon the first guaranty, was \$1,555.57, leaving a balance of \$5.77 to apply upon the debt accruing under the second guaranty.

The merchandise furnished by the plaintiffs to T. W. R. Nichols upon the second contract, and relying upon the second guaranty, was, after applying the balance of credit upon the first contract, \$856.03.

A note of \$600 was given by T. W. R. Nichols to the plaintiffs, not to apply in payment on the account, but merely as a collateral security, together with a mortgage of land in Essex, worth, over and above a prior incumbrance, about \$300, to secure the note; but the note was not to be credited till paid, and, as nothing had been paid upon it, it was not allowed as a credit.

The defendant insisted, that, upon the first guaranty, he was entitled to immediate notice, whether the plaintiffs furnished the articles upon commission, or sold them to the principal. The plaintiffs did not give personal and express notice that they had accepted the first guaranty; but the defendant was at the plaintiffs' store, with his brother T. W. R. Nichols, when the guaranty was delivered to the plaintiffs, and the first contract executed; and a part of the goods were sold under such contract and guaranty, on that day, to T. W. R. Nichols, the defendant being in the store at the time and knowing of such sale. The defendant and T. W. R.

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Nichols were brothers, lived near each other, the defendant being frequently in the store of T. W. R. Nichols, and having a general knowledge of his business; and the defendant was informed by his brother that the goods he sold were mainly obtained from the plaintiffs. T. W. R. Nichols did not sell goods before the contract was made with Noyes, and proposed to the defendant to go into business if the defendant would aid him in getting goods from the plaintiffs, and, to effect this object, the guaranty was given, immediately after which, T. W. R. Nichols went into business as aforesaid.

If evidence of the foregoing facts was admissible, in law, to prove notice to the defendant of the acceptance of his guaranty by the plaintiffs, the referee found that the defendant had notice of the plaintiff's acceptance of the first guaranty, and of their furnishing goods to T. W. R. Nichols, relying upon such guaranty, and that such goods were sold, and not furnished on commission.

The referee further reported, that he was not able to find that the written contract, dated May 19, 1851, was ever seen by, or shown to the defendant; but he did find that the defendant knew there was a contract between the plaintiffs and his brother, upon which the plaintiffs sold him goods, and the general character of their dealings under it. The defendant also insisted that he was entitled, under the first guaranty, to reasonable notice of the amount furnished from time to time, and of the amount of his liabilities at the end of the year, and, for want of such notice, was discharged. The referee found that no personal and express notice was given by the plaintiffs to the defendant of the amount furnished from time to time; but, from the relations of the parties, and the acquaintance of the defendant with his brother's business, as before stated, the referee did find that the defendant knew the plaintiffs were furnishing his brother goods from time to time, and had a general knowledge of about the amount of goods so furnished,—but no definite knowledge of the precise amount of his bills, and no notice from any one, at the end of the year, of the exact amount of his liability under the contract.

The defendant also insisted, that the plaintiffs' taking the \$600 note, and the mortgage of all T. W. R. Nichols' real estate to secure the same, his changing the business (as he contended) un-

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der the second contract to a commission business, and their furnishing goods under such second contract, to be mingled with the goods sold under the first contract, deprived the defendant of all power to secure himself, and discharged him from all liability on the first guaranty.

The referee found that the plaintiffs took such \$600 note, payable on demand, and a mortgage of all T. W. R. Nichols' real estate to secure the same, as collateral security, merely, for his debts to them, but he did not find that the second contract changed the business to a mere commission business. The plaintiffs furnished the said T. W. R. Nichols with goods under the second contract, at their store in Burlington, and T. W. R. Nichols took them to Essex, and mingled them with his other goods there, but in so doing, he acted without any direction from, or privity with the plaintiffs, unless their knowledge of his intent made them privy to such acts; and the referee decided that the defendant was not, by any such acts, discharged from his liability on the first guaranty.

As to the second guaranty, the defendant insisted that he was, by its terms, only liable for goods "*obtained upon a credit*;" that the second contract did not provide for any credit, or vest any title, property or interest in the goods in T. W. R. Nichols, but merely gave him the custody of the goods, and the right to sell them on commission for the plaintiffs; that the defendant was only liable for goods sold to his brother, and did not guaranty that his brother should faithfully sell on commission, or account for such sales.

The defendant also insisted, that, although he waived all notice of the plaintiffs' acceptance of, and action under the second guaranty, still that the plaintiffs were bound, at the end of the year, and at the close of the transaction, to give him notice of the amount of his liability, and that no such notice was given; and the referee found that the plaintiffs did not give any express and personal notice of such amount after the close of the transactions, but did find, from the relations of the parties, and from the defendant's frequent presence in his brother's store, and knowledge of his business, and from being informed by his brother that he mainly purchased his goods of the plaintiffs, that the defendant had a general knowledge of about what was the extent of such indebtedness,—but did not know its precise amount, nor was ever informed, before this suit

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was brought, of the precise amount. About a month or six weeks after the second year had expired, and before any offer to return the goods was made, a negotiation arose between the plaintiffs and T. W. R. Nichols, as to making a contract for another year. The plaintiffs delayed giving any definite answer whether they would or would not make such contract from time to time, for about two months,—advised him to replenish his stock by making purchases elsewhere, (which he did, to the amount of about \$100,) and finally, without giving him any further answer or notice, attached all the goods in the store on his debt to them, accruing under such contracts and guaranties.

The defendant insisted that the stipulation in the second contract, that the indebtedness on the first contract should be paid before applying payments on the second contract, discharged the defendant from his guaranty; and, also insisted, that he was discharged from the second guaranty, because the goods furnished under the second contract were mingled with those had under the first contract; but the referee decided otherwise.

The defendant also insisted that it was the duty of the plaintiffs, at the end of the year, to have taken the goods into their own possession; and that, by omitting so to do, they caused them finally to be sold at a discount of $17\frac{1}{2}$ per cent from the prices charged, when, by taking them back, the discount, by the terms of the agreement, was only to be 10 per cent, thus causing the defendant a loss of $7\frac{1}{2}$ per cent.

The referee found that the plaintiffs did not, at the end of the year, take the goods into their possession, but that, on the 26th of October, 1853, they attached them in a suit against T. W. R. Nichols for his debt to them; that finally, by an arrangement made between the plaintiffs and T. W. R. Nichols, the goods were sold to one Sherwood at a discount of $17\frac{1}{2}$ per cent from the prices charged by the plaintiffs. But the referee decided that the plaintiffs were not bound, at the end of the year, to take back the goods into their possession, and that, the goods being attached, the sale to Sherwood was, under such circumstances, reasonable and beneficial to all the parties.

It appeared that there was a mortgage on the land in Essex, prior to the mortgage given to the plaintiffs, for about \$126; that

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the plaintiffs, in the name of one Vilas, paid the holder of the prior mortgage the amount due on it, took an assignment of it to Vilas, brought a bill of foreclosure in the name of *Vilas v. T. W. R. Nichols*, and got a decree of foreclosure, which would expire on the 30th of April, 1856. It also appeared that the premises mortgaged were worth about \$200 more than the amount due by such decree. The defendant insisted that these acts of the plaintiffs were done to defraud the guarantor, and that he was thereby discharged; or, if not discharged, that the value of the premises over and above the prior mortgage should be applied in payment of the debt due the plaintiffs from T. W. R. Nichols.

But the referee did not find that the acts aforesaid were done to defraud the guarantor or to impair his rights; and that, as nothing had been paid on the \$600 note, and as the equity of redemption had not expired, the value of the premises beyond the amount of the decree ought not to be applied on the debt due the plaintiffs.

Upon the report, the county court, November Term, 1855,—PECK, J., presiding,—rendered judgment, *pro forma*, for the defendant, to which the plaintiffs excepted.

Peck & Harvey and *J. Maack* for the plaintiffs.

A guaranty is to be construed liberally so far as to ascertain its intent or latitude, *it being a commercial instrument*. Its intent or latitude having been thus ascertained, the given case must be clearly brought within it. In no other sense is the construction "*strictissimi juris*." 3 Kent's Com. 124.

In ascertaining intent, doubtful language is to be taken most strongly against the guarantor. 7 Pet. 122, *Douglass et als. v. Reynolds et al.*; 12 Whea. 515, *Drummond v. Preston*; 12 East, 227, *Mason v. Pritchard*; 3 Whea. 148, *Lamp v. Barker*, note A, by Wheaton.

Notice of the fact of the plaintiffs' acceptance of, and action under the guaranty were proved by competent evidence.

Proof of any circumstances by which the guarantor was likely to get notice was sufficient. *Avilard v. Williams*, Chittenden Co., January Term, 1832, cited by the court in 11 Vt. 444, *Train & Co. v. Jones*; 13 Vt. 106, *Oakes v. Weller*; 16 Vt. 63, *same v. same*; 22 Vt. 160, *Lowry v. Adams*.

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Notice of the amounts furnished, from time to time, or of the whole amount at the end of the year, was not requisite.

Such notice, during the progress of the dealings, would have impaired, by its inconvenience, the utility of the instrument. The guaranty being continuous, no principle of law has gone so far. 7 Pet. 126, *Douglass et als. v. Reynolds et al.*

By the English Law, notice of acceptance, in case of a guaranty for future credit, is unnecessary. The duty to give it is recognized in this state as necessary to produce mutuality of understanding. 13 Vt. 106, *Oakes v. Weller*; 12 Pet. 206, *Cunningham et al. v. Jones*; 7 Pet. 113, *Douglass et als. v. Reynolds et al.* In a continuous guaranty, the duty is satisfied by acceptance and notice, without notice of the extent. The mutuality then exists; the guarantor and principal are in privity; the latter is a complete source of information, and the creditor may reasonably infer that the former improves himself of it.

If such notice is requisite, the referee has found it. He has found *actual knowledge of the substance of the claim*. It thus put him upon his guard. His want of further knowledge arises from a waiver to ascertain it.

If the first guaranty obligated the defendant, the clause in the contract of June 1852, did not affect the validity of the second guaranty. The defendant was liable under each. It was indifferent to him where the applications were first made. If he had a right to direct them, in omitting to do so, he left it to the parties. The agreement did not prevent his interfering at any time.

The contract of June, 1852, was within the second guaranty. It was one of sale, and on credit. It gave T. W. R. N. the right to sell while in possession. This was the object of buying. 22 Vt. *Lowrey v. Adams*.

The stipulation for the application of payment did not extend the time of payment under the first guaranty. It was reserving in the plaintiffs the right to have that done which T. W. R. Nichols could have *elected* to do. Nichols having the right to make the application in that way, their consenting to receive them was in pursuance of the terms of the old debt, as it was, and therefore was not the making of a new agreement as to him. It left the plaintiffs open to sue as before.

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J. B. Wheeler and *F. G. Hill* for the defendant.

A surety is not held beyond the fair scope of his engagement. His liability is always *strictissimi juris*, and shall not be extended by construction. *McClusky v. Cromwell*, 1 Kernan 598; or by implication, 3 Kent 124; Burge on S. 42. *United States v. Boyd et als.*, 15 Peters 208; *Dobbin v. Bradley*, 17 Wendell 424.

The first guaranty is not *absolute*. It is for goods to be furnished "*on commission or otherwise*." A fair construction of this guaranty is for goods to be sold on commission only; when a contract can be carried into effect by its terms which need no construction or extension by implication, it is the duty of the court to do so, and confine the duty of the one party and the undertaking of the other to those terms in the contract which are plain and need no construction; especially is this the case in a contract of surety; 1 Kernan 602.

"It is the duty of the individual, who contracts with one man on the credit of another, not to trust to ambiguous phrases and strained construction." 2 U. S. Cond. 423, *Russell v. Clark's Ex.*

If the court should conclude that the plaintiffs and T. W. R. Nichols might make a contract under the "*or otherwise*," which would be obligatory on this defendant, and that the terms of the contract were left wholly optional with the plaintiffs, then the plaintiffs were bound to give the defendant notice of how that option had been exercised; 6 Mees. & Wels. 442, *Vyse v. Wakefield*; 2 Amer. Leading Cases 59, 60, 61; 16 Com. Law 180, *Payne v. Ives*.

"It is the duty of a party taking a guaranty to put the surety in possession of all the facts likely to affect the degree of his responsibility, and if he neglects to do so, it is at his peril." 10 Eng. Com. Law 197, *Pidcock v. Bishop*; *Craft v. Isham*, 13 Conn. 32.

The reasoning in 13 Vt. 110 & 111, *Oakes v. Weller*, sustains the same principle.

We insist "that a demand of payment should have been made of T. W. R. Nichols, and, in case of non-payment by him, that notice of such demand and non-payment should have been given in a reasonable time to the defendant; otherwise the defendant would be discharged from his guaranty." *Douglass v. Reynolds*, 7 Peters 113-126; *Craft v. Isham*, 13 Conn. 28; 12 Pick. 133, *Babcock v. Bryant*. 2 Am. L. Cases 66, 67, 68, 69; 18 Vt. 36.

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The kind of notice found in the report will not do. If notice of any sort is required at the close of the transactions, then that notice should be certain and exact. 13 Conn. 41, *Craft v. Isham*.

If it is not required as soon in the case of a guaranty as in that of a negotiable note, it must be as certain when it does come.

The note of \$600, taken from T. W. R. Nichols by the plaintiffs, with the receipt given therefor by the plaintiffs, and the stipulation in the second contract that payments thereunder shall be "from time to time as promptly as can be made;" and that such payments shall be made in satisfaction of T. W. R. Nichols' previously existing indebtedness, amounts to a contract for the extension of the time for the payment of such indebtedness, which discharges this defendant. 21 Vt. 33-44, *Austin v. Dorwin*.

Again, we say, that the acts of the plaintiffs, in taking a mortgage of T. W. R.'s real estate, and advancing their goods to be mixed with the goods on hand, for which the defendant was liable, (if liable at all,) so that he could not secure himself on either, and thereby putting all the means, which T. W. R. had, out of the power of the surety to secure himself on, discharges him. 8 Pick. 130.

If they intended to hold the surety, they should have left his real estate free and the goods free for him to secure himself upon. But as it was, he could not have meddled with them without making himself liable to them in trespass or trover. 12 Wendell 123-126, *Moore v. Paine*.

The second guaranty contemplates a sale of goods upon *credit*, but under the second contract no credit is intended, none is given.

If the plaintiffs intended to rely upon the second guaranty, they so varied the terms of the contract with the principal from the terms of the guaranty, as to discharge the defendant, or, rather, so that no liability ever attached to the defendant. 5 Wendell 203, *Coming v. Colt*; 2 Caines' Cas. in Er. 80; 6 Hill 540.

A guarantor is only liable according to the precise terms of his guaranty, and if the creditor makes an agreement with the principal inconsistent with the terms of the guaranty, no liability attaches. 17 Wendell 422, *Dobbin v. Bradley*; 10 Johnson 180, *Walsh v. Bailie*; 8 Wendell 512-516, *Wright v. Johnson*; 10 Com. Law 197, *Pidcock v. Bishop*; 4 Com. Law 72, *Glyn v. Hertel*; 2 Caines' Cas. in Er. 57-58.

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It is a fraud on this defendant that the plaintiffs seek to make him liable for goods delivered under this guaranty when the avails of such goods were to be applied to the payment of a former indebtedness of T. W. R. 10 Com. Law 197, *Pidcock v. Bishop*.

The mingling of the goods and the accounts of all the transactions, under both guaranties and contracts, by the plaintiffs, in one comprehensive hotch-pot, was a fraud, in fact and in law, on this defendant, which discharges him, if ever liable.

We say, further, the attachment of the goods by the plaintiffs was a legal taking back of the same, so far as advanced under the last contract.

At any rate, attaching the goods, under the circumstances of this case, and then selling them at private sale, under an agreement with T. W. R., instead of a legal sale under the attachment, was a fraud on the rights of this defendant, 2 Caines' Cas. in Er. 35.

The purchase, by the plaintiffs, of the previous mortgage on T. W. R.'s real estate, in the name of Vilas, in the manner found by the referee in the report, was a fraud upon the defendant. 4 John. Ch. 130, *Hayes v. Ward*; 8 Pick. 122-129, *Baker v. Briggs*.

The opinion of the court was delivered by

BENNETT, J. This is an action of assumpsit, founded upon two written guaranties, one bearing date the 16th of May, 1851, and the other the 17th day of June, 1852, copies of which are annexed to the report of the referee, and may be referred to. It is found that the guaranties were duly executed, and delivered to, and accepted by the plaintiffs, and that the defendant had due notice of such acceptance; that the contracts between the plaintiffs and the principal, set forth in the report, were made in reliance upon the defendants guaranties, and the goods furnished upon the strength of them. We have no doubt of the admissibility of the facts detailed in the report of the referee, to which reference may be had, to prove a notice to the defendant of the acceptance of his first guaranty by the plaintiffs, and of their furnishing goods to the principal upon the faith of such guaranty, by a sale, and not on commission. The cases of *Oaks v. Weller*, 16 Vt. 63, and of *Lowry et al. v. Adams*, 22 Vt. 160, abundantly show the admissibility of the facts reported by the referee, for the purposes for

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which they were offered, and would seem abundantly to justify his inference from them.

In regard to the plaintiffs' claim, under the first guaranty, the referee says that he is not able to find that the defendant ever saw the written contract of the 19th May, 1851, between the plaintiffs and the principal, but he does find that the defendant knew there was a contract between them, upon which the plaintiffs sold the principal goods, and the general character of their dealings under the contract, and the referee says, that though there was no personal and express notice, given by the plaintiffs to the defendant, of the amount furnished from time to time, yet he does find, from the relation of the parties, and the acquaintance which the defendant had with his brother's business, as detailed in the report, that the defendant knew that the plaintiffs were furnishing the principal with goods, from time to time, and had a general knowledge of about the amount of goods furnished, though no definite knowledge of the precise amount of his bills, and no notice, at the end of the year, of the exact amount of his liability under the contract.

We will, in the first place, consider the original liability of the defendant, upon the facts proved, on the first guaranty. This letter of guaranty, addressed to the plaintiffs, says to them, "if you will furnish T. W. R. Nichols with merchandise and tin ware, upon commission, or otherwise, I will be accountable to you for all his contracts or engagements, as you and he may agree, and in case he does not fulfill them as agreed, I will guarantee the payment thereof." There can be no question but what this guaranty is prospective in its terms, and looks to a future operation of the principal with the plaintiffs, according to an agreement thereafter to be made between them, and by that agreement, made the 19th of May, 1851, the principal, among other things, agreed "to purchase of the plaintiffs all the merchandise and tin ware which he should want for one year," &c. It is a correct proposition, as laid down by the defendant's counsel, that a surety is not to be held beyond the fair scope of his engagement, and that presents the question whether the dealings of the principal with the plaintiffs are within the first guaranty. The referee has found a sale of the goods, delivered to the principal by the plaintiffs, and not a delivery to sell on commission, and there can be no doubt that the executory contract between

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the plaintiffs and the principal of the 19th May provided for a purchase, and it is only necessary then to inquire, whether the guaranty, or letter of credit from the defendant to the plaintiffs, authorized a sale of the goods upon the strength of it; and of this, we think, there can be no serious question.

The request to the plaintiffs is, to deliver, to the principal, merchandize and tin ware, upon commission or otherwise, accompanied with the promise of the guarantor to be accountable to the plaintiffs for all the contracts, or engagements of the principal, as the plaintiffs and he should agree. The construction of this letter of credit is too obvious, we think, to admit of debate, and we have no occasion to settle the rule of construction in relation to guaranties, which are ambiguous, that is, whether the construction shall be in favor of the guarantor, rather than the guarantee. Technical rules of construction are not to be resorted to where the meaning of the parties is plain and obvious.

No doubt there are cases which go the length of holding that a contract of guaranty is one *strictissimi juris*, and is to be construed in favor of the guarantor, and to this effect is *Nicholson v. Paget*, 1 C. & M. 48; and see also *Mellville v. Hayden*, 3 B. & A. 593.

But in the case of *Mason v. Pritchard*, 12 East 227, the common rule of construction of contracts, was applied to a guaranty, and the construction was against the guarantor, and in the late case of *Mayer v. Isaac*, 6 M. & W. 605, the case in the 12th of East was approved of. See also *Hargrave v. Smee*, 6 Bing. 244, and *Drummond v. Prestman*, 12 Wheat. 515. If it was important in this case, it might well be questioned whether, in this respect, there is any good ground for making contracts of guaranty an exception to the general rules in regard to construction. It is sufficient, for this case, to say that the letter of guaranty needs no extension by implication, in order to bring the plaintiffs' case, as found by the referee, within the plain and obvious scope of the defendant's guaranty. That it gave a right or power to the plaintiffs to consign the goods to the principal, to sell on commission, or to make a right out sale of them to him, if the parties should so agree, is beyond a reasonable doubt.

It is said in argument, that if the contract of guaranty is held to be in the alternative, and to give to the plaintiffs and the prin-

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principal an option, either to deliver the goods, to sell on commission, or upon a sale, then the plaintiffs must have given the defendant notice, in what manner that option had been exercised.

We have no occasion to examine the soundness of this position, or even question it. The referee finds, and, as we think, upon competent testimony, not only notice to the defendant of the plaintiffs' acceptance of this guaranty, and of their furnishing goods to the principal, relying upon it, but also, that such goods were sold, and not furnished on commission.

The defendant would hardly claim, since the case of *Oaks v. Weller*, in the 16 Vt., that such notice must come from the plaintiffs, necessarily.

✓ We apprehend that the defendant had all the notice of the advancements made upon this guaranty, which the law can require. He knew the plaintiffs were furnishing goods to the principal from time to time, and had a general knowledge of about the amount of goods furnished. The object of the notice is to secure to the guarantor his rights, and means of protecting himself, and certainly, so far as the amount of his liability was concerned, if he knew about the amount, it was enough to put him on inquiry if he wished to know the precise amount, and it was all that was necessary for the security of the guarantor, and sufficient to enable him to act understandingly, as it respected his principal, either by recalling his letter of credit, or by requiring an indemnity from his principal, or by doing both, if judged advisable. In the case of *Douglas et al. v. Reynolds et al.*, 7 Peters 126, it was held, that under a continuing guaranty, the law did not require notice of successive advancements under it, from time to time, as made, and that it was enough if the guarantor had notice of their amount when the business was closed.

It is claimed in argument that, as the case does not show a demand of payment of the principal, and notice of non-payment to the defendant, in a reasonable time, the defendant is discharged from his guaranty. But we think this is not a case requiring, in this respect, any such action from the plaintiffs. The surety assumed to be accountable for all the contracts or engagements of the principal, as he and the plaintiffs might agree, and guaranteed the payment thereof, in case he did not fulfill them as agreed.

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This is a direct and an absolute undertaking for the act of another. The addition of the words, "in case he does not fulfill them," does not alter the nature of the undertaking, or impose any duties on the plaintiffs, which would not exist without them. In *Smith v. Ide*, 3 Vt. 290, the words of the guaranty were, "Mr. Gilman says he has bought a pair of horses of you for \$260, in sixty days. I will warrant him to pay according to his agreement." No demand upon the principal for payment, or notice of his default to the surety was held necessary to charge him. The same was held in *Train & Co. v. Jones*, 11 Vt. 444.

In that case the principal wished to purchase a quantity of hides, and the language of the guarantor was, "I will stand responsible for the fulfilment of any contract the principal, or his agent shall make." In *Peck v. Barney*, 13 Vt. 93, the language was, "if said claims are not paid or secured by the principal, within six months from the date, I do agree to secure or pay the same."

In that case the court say that, "a person who stipulates for a thing to be done by himself or another, is bound to see it done, and that notice was necessary only of that which the plaintiff was to do." See also *Sylvester v. Downer*, 18 Vt. 35. Under the guaranty now before us, no act was required on the part of the plaintiffs towards getting their pay from the principal. They were only bound to receive it when offered to them. See *Williams v. Granger*, 4 Day 444. *Lent v. Padelford*, 10 Mass. 230. *Breed v. Hilhouse*, 7 Conn. 523. *Douglas v. Howland*, 24 Wend. 35. Under the decisions in this state, we think it is well settled that, in a case like the present, no demand of the principal was necessary to give a right of action against the principal, or the surety, and, of course, no notice of his default need be given to the surety; and such, we think, was the common law. It is a common principle that, if an act is to be done by a third person, who is known, no notice need be given. See *Somersall v. Barnaby*, Cro. Jac. 267.

We, then, have no hesitation in holding, that the defendant would have been liable upon his first guaranty had not the principal's indebtedness for goods delivered under that guaranty been cancelled by his credits.

We will now examine the plaintiffs' case, under their second guaranty.

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It cannot be questioned that the defendant's waiver of acceptance of this guaranty, and of the proceedings of the plaintiffs under it, are binding upon him; *Bickford v. Gibbs*, 8 Cushing 154. It is found that the goods delivered to the principal, under the contract of the 18th of June, were delivered upon the faith of the second guaranty, but is claimed that the terms of that contract do not bring the plaintiffs' case within the fair scope of that guaranty. If such is the fact, most certainly the defendant cannot be charged upon it. But we cannot so view it. The guaranty, after reciting that the principal was desirous of obtaining, from time to time, goods upon a credit, binds the guarantor to a fulfilment of the principal's agreements with the plaintiffs, according to his contract. The contract between the plaintiffs and the principal, created a conditional sale of the goods delivered under it, and the provision in it, that the property of the goods should remain in the plaintiffs, until paid for, rendered it none the less a sale on credit. Though it was the object of the guaranty to enable the principal to obtain goods upon credit, yet the particular conditions and terms of the credit are purposely left with the principal to arrange with the plaintiffs. The guaranty is absolute in its terms, and as broad as it well can be, binding the defendant to a performance of the principal's contract, as thereafter to be made. We cannot see why the contract of the 18th of June is not within the fair scope of the second guaranty.

The principal might well agree that the title of the goods should remain in the plaintiffs till their price was paid, and the provision in the contract securing to the principal the right, at his election, of returning the goods which should remain unsold at the end of the year, at a given discount, or to turn in barter pay, are provisions for the benefit of the principal, and increase his facilities for cancelling his debt, and thereby exonerate the surety. Of this the surety cannot complain. The principal's contract contains an express agreement to purchase the goods, and, upon a conditional sale, the relation of debtor and creditor is at once created between the vendor and vendee, and it is as much a purchase upon credit, as if the sale had been absolute in its terms.

We apprehend that the defendant cannot complain of that provision, in the contract of the 18th of June, which provides that

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payments shall be made for goods delivered, under the first contract, before any application shall be made on that one. The defendant stood liable, on his first guaranty, for the goods delivered on that contract, and the payment enured to his benefit equally as if applied on the last contract. The defendant had no equitable lien upon the goods, which could give him a right to have application first made on the last contract, and it cannot be maintained, upon the facts in this case, that the provision was in fraud of the surety whether communicated to him or not. The case of *Pidcock et al. v. Bishop*, 10 Com. Law 197, is widely different from the present case. In that case the pig iron was sold to the principal debtor by the plaintiffs, at its market value, under a secret agreement that he should pay, in addition to that, 10s per ton, to one of the plaintiffs, upon an old debt which he owed him individually, and this, it is true, was held to be a fraud upon the defendant, who had guaranteed to the plaintiffs the payment of £200 value, to be delivered to the principal in Lightmoore pig iron. This, it was said, was a diversion of a portion of the funds of the vendee from being applied to discharge the debt, which he was about to contract with the plaintiffs, and render the vendee less able to pay for the iron supplied to him, and that the surety had a right to expect that the funds arising out of the iron sold would be applied towards discharging the debt, which he had become collaterally responsible for; and that the surety had a right to have been informed of all those facts, which were likely to affect the degree of his responsibility. In the case now at bar, there was no diversion of the funds to the injury of the surety, and the application is such as the law would have made, in the absence of any express agreement to the contrary.

Although the contract of the 18th of June provides that the respective bills of goods, purchased by the principal, shall be payable from time to time, as promptly as payments can be made, yet this provision is to be taken in connection with the one which provides for the payment of the old debt first; and the contract is so to be construed, that all its parts may stand, which is not difficult, the last provision simply qualifying the former.

It has been remarked already, that this guaranty is absolute, binding the surety to the fulfilment of the principal's contracts with

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the plaintiffs, unconditionally, and in general terms. In such a case, no demand of payment of the principal, and notice of his default to the surety can be necessary to charge him. By the effect of the waiver, no notice of the acceptance of the guaranty, or of the advances under it, was necessary.

The amount of the plaintiffs' advancements, under the guaranty, is a necessary part of, and is involved in their action under it. But, as matter of fact, it is found that the defendant had a general knowledge of about the extent of the advancements. He, however, by the waiver, was clearly to see to this, at his peril.

The fact that the goods purchased were commingled by the principal with others, (the plaintiffs knowing that such was his intention,) had no effect to injure the surety, and could not be in fraud of his rights. It did not lessen the principal's means to extinguish this debt, and the surety had no specific lien on the goods advanced under his guaranty, and, much less, that they should not be commingled with other goods.

It is claimed that it was the duty of the plaintiffs to have informed the defendant of that provision in the contract which gave the principal the right, at the end of the year, at his election, to return such goods as remained unsold, at a given rate of discount, and that because it does not appear that this was done, the surety, it is said, is discharged. But this is a provision over which neither the surety or the plaintiffs had any control, and could not compel the principal to elect to return the goods, and neither the plaintiffs or the surety had any legal or equitable right to look to a return of the goods unsold, under this provision of the contract as a special means of discharging the principal's liability, and we cannot conceive that an omission to make this provision in the contract known to the surety, operated as a fraud upon him. Besides, the surety might have well resorted to the principal, for whom he had undertaken, to learn the particulars of his contract, if he desired it.

The provision in the contract, that the goods bargained and sold should remain the property of the plaintiffs till paid for, in no way increased the risk of the surety, but gave the plaintiffs a further security; and an exercise of this right, by retaking the goods, if it existed under the whole contract taken together,

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would be beneficial to the surety. No doubt the contract, so long as the goods remained in the possession of the principal, under it, clothed him with a power of sale. It can hardly be claimed that the surety could compel the plaintiffs to retake the goods. The most, as it seems to me, that they could claim, would be to be subrogated to this right in the place of the plaintiffs, upon his payment of the debts, and whether that right would exist, it is not necessary to inquire.

The attachment and the sale of the goods by the plaintiffs, is not what the surety can complain of. Though, under this guaranty, the plaintiffs were not bound to take active means to collect the debt of the principal, yet they had a right to do it, if done in good faith to the surety, and the referee finds that, under the circumstances of the case, the sale was reasonable and beneficial to all the parties. The plaintiffs were not to be compelled, by the surety, to sell the goods at public auction, against the agreement of the principal.

The \$600 note was properly disallowed. It was a note of the principal, payable on demand, and was received as collateral security, under an express agreement that it was not to be credited to the principal till it was paid, and it is found nothing had been paid upon it. We think the surety has no more ground to claim an allowance of this note than the principal, or that he is released by the transaction. The note, being on demand, was no extension of time to the principal, by implication, and the plaintiffs were, at any time, at liberty to commence suit against the principal, the same as if the note had never been given.

Whether the surety would, upon the payment of the debt, be entitled in equity to the benefit of the note and the mortgage, given to the plaintiffs, is another question.

Though no precise time is fixed by the contract, for the payment of the balance of the principal's account, yet we think he was bound to pay it, at least, within a reasonable time after the close of the business, at the end of the year; and this suit was not commenced until long after the expiration of such reasonable time.

The purchase in of the outstanding mortgage which the principal had previously given on the premises, which he subsequently mortgaged directly to the plaintiffs to secure the \$600 note, can

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have no effect. Although the plaintiffs had obtained an assignment of it to Vilas, and obtained a foreclosure in his name, yet nothing had been paid upon it, and the equity of redemption had not then run, and upon these facts, it is clear that the surety was not entitled to any allowance. The value of the equity of redemption, under the first mortgage, was some \$200; and this, in effect, passed to the plaintiffs as a security for the \$600 note.

If, in the end, the title became vested in Vilas, under his decree, in trust for the benefit of the plaintiffs, it is not necessary to decide whether in equity he should hold the premises, for the benefit of the surety, so far as their excess above the amount of the first mortgage is concerned. It is clear that, at the time of the reference, no claim could exist, in law or equity, in behalf of the principal or surety, why the plaintiffs should be charged with the value of the equity of redemption acquired under their mortgage. The referee negates all fraud in the plaintiffs, or a design in them to impair the rights of the surety, and I am not aware of any general rule in equity, any more than at law, which compels a creditor to exhaust his remedy against his principal before he can go against the surety, unless the contract of suretyship shall require it.

Judgment of the county court is reversed, and judgment on the report for the plaintiffs for their damages and costs.

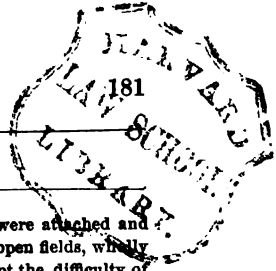
WILLIAM P. BRIGGS v. SAVEDIA W. TAYLOR.

Negligence. Liability of officer for preservation and care of property attached. Degree of diligence required of attaching officers, and other bailees for hire.

The question of negligence may, in some cases, be withdrawn from the consideration of the jury, as where there is no testimony tending to show it; or where a given course of conduct is admitted which results in detriment, and no excuse is given. In the latter case the liability follows, as matter of law, and there is nothing for the jury but a question of damages.

DECEMBER TERM, 1855.

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Where a carriage, wagons and sleighs, which were not past use, were attached and were allowed by the officer to remain during a winter in the open fields, wholly exposed to the weather, for which no excuse was offered except the difficulty of finding a place for them under cover, the jury should have been instructed that the officer was liable for the damage done to the property; and it was error to submit to the jury the question, whether or not the officer exercised proper care.

The degree of diligence required of attaching officers and other bailees for hire is that which prudent men exercise in the conduct of their own affairs.

This definition, which is now almost uniformly used by the English judges, seems more definite and just, and less liable to be misunderstood by juries, than the terms common and ordinary care or diligence. REDFIELD, CH. J.

ACTION ON THE CASE against the defendant, as sheriff, for the neglect of his deputy in preserving and taking care of property of the plaintiff which the deputy had attached. Plea, the general issue; trial by jury, September Term, 1853,—PECK, J., presiding.

Among other articles attached by the defendant's deputy was a two-horse pleasure carriage and several wagons and sleds which the plaintiff's testimony tended to show were removed at the time of their attachment to the premises of a third person, and there left in the open fields, where they were allowed to remain from September, 1851, to the following April, exposed to the rain and snow, &c. The defendant's testimony tended to show that the carriage was an old one, and that the wagons and sleds were, as the witnesses described them, "not very new nor very old;" that the deputy applied to the person upon whose premises they were removed for shed room for them, but was refused; and that they were not much injured by their standing out for the time they did. The plaintiff insisted, as a matter of law, that, as the officer had permitted the property to remain exposed to the weather and unprotected as herein above mentioned, whereby it had suffered damage and become reduced in value, that it constituted such a neglect of duty on the part of the deputy, as would render the defendant liable in this action. The court left the question to the jury to find whether the deputy exercised ordinary care and prudence in taking care of, and in the preservation of the property attached; and in reference thereto, gave the jury, in substance, the following instructions; that it was the duty of an officer attaching property to use ordinary care and prudence in the custody and preservation of

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the property attached, and that ordinary care and prudence was such care and prudence as men of ordinary care and prudence usually exercised over their own property ; and that it was for them to say whether it was common or ordinary care and prudence to keep such property as the carriage, wagons and sleighs in question in the manner in which it was kept. Verdict for the defendant. Exceptions by the plaintiff.

W. P. Briggs, pro se.

The law, and not the jury, is to determine what is a prudent and proper care of property so in the hands of the officer, on a given admitted state of facts ; hence the jury should have been told that, if they found the carriages and sleds were suffered by the officer, to remain in the open field from September, 1851, to April, 1852 ; the same being the worst season of the year for the decomposition of wood, that then the plaintiff must recover, unless they also found that there were no roofs of shelter, nor boards to make one of to be found in the country.

The charge as to the degree of diligence required, was too indefinite, and too general.

No such charge as this can be found in any of the reports on this subject.

Judge McLean, in his own reports, Vol. 3, and pages 354 and 342, charges the jury that the officer is bound to use all that diligence, prudence and care which *careful* men, (not ordinary men,) use with their own property. See also, 2 Adolph. & Ellis 260 ; 4 B & Alderson 30, *Batson v. Donavan* ; 5 Denio. 586, *Brown v. Hanford* ; 1 Fairfield 20, *Well v. Green*.

G. F. Edmunds for the defendant.

The question whether the defendant's deputy was wanting in ordinary care and prudence, was one of fact which it was the constitutional right and duty of the jury to decide ; and it would have been an unwarrantable usurpation of power in the court below, to have interfered with the exercise of that right and duty ; 14 John. 304, *Foot v. Wiswall* ; 15 Pick. 291, *Coffin v. Aetna Insurance Company* ; 11 Vt. 621, *Lindsay v. Lindsay* ; 8 Met. 437, *O'Kelley v. O'Kelley* ; 18 Vt. 18, *Hopkinson v. Holmes* ; Story Bail. § 11.

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Actions for injuries from insufficient highways, afford a uniform illustration of this rule ; 6 Vt. 245, *Leicester v. Pittsford* ; 22 Vt. 458, *Willard v. Newbury*.

As to what constitutes ordinary diligence, the court fully instructed the jury, and gave to these terms the definition universally recognized ; Story Bail. § 11 ; 7 B. Monroe, 661, *Swigert v. Graham*, (8 U. S. D. 43 ;) 23 Vt. 387, *Quimby v. Vt. Central R. R. Co.*

The opinion of the court was delivered by

REDFIELD, CH. J. In regard to the carriage, and the wagons and sled, which were not past use, although the carriage was an old one, and the wagons and sleds were described by the witnesses, as being "not very new nor very old," it seems to us there was no testimony in the case tending to show that an officer who held them under attachment, would be fully justified in letting them stand outdoors all winter. We could scarcely conceive of a state of facts justifying such a course, short of absolute necessity, which, it would seem, would never occur when boards could be obtained. And where there is no testimony, tending to excuse an officer in such case, it becomes a mere question of damages. Questions of negligence are said in the books to be mixed questions of law and fact, but where there is no testimony tending to show negligence, or where a given course of conduct is admitted, which results in detriment, and no excuse is given, the liability follows, as matter of law, and there is nothing but a question of damages for the jury.

We do not think a judge is ever bound to submit to a jury questions of fact, resulting uniformly and inevitably, from the course of nature, as that such carriages will be injured more or less by exposure to the weather during the whole winter, or that a judge is bound to submit to a jury the propriety of such a course, when it is perfectly notorious that all prudent men conduct their own affairs differently. This uniformity of the course of nature or the conduct of business, becomes a rule of law. But while there is any uncertainty, it remains matter of fact, for the consideration of a jury. It could not be claimed, that it should be submitted to a jury whether cattle should be fed or allowed to drink, or cows be milked.

II. As, from the determination of the first point, a new trial

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becomes necessary, it will be of some importance to inquire in regard to the proper mode of defining the duty of the officer in keeping goods attached on mesne process. It is usually defined in practice, in this state, certainly so far as we know, much as it was in this case, by the use of the terms, "ordinary and common care, diligence, and prudence." And it is probable enough, these terms might not always mislead a jury. But it seems to us, they are somewhat calculated to do so. If the object be to express the medium of care and prudence among men, it is certain these terms do not signify a fixed quality of mediocrity even. For if so, they would not be susceptible of the degrees of comparison, as more ordinary and most ordinary, which medium, and middle, and mean, are not. The truth is, that ordinary and middling and mediocrity even, when applied to character, do import, to the mass of men, certainly, a very subordinate quality or degree; something quite below that which we desire in an agent or servant, and which we have the right to require in a public servant, especially. A man who is said to be middling careful, or ordinarily careful, is understood to be careless and is sure never to be trusted.

We have been at some pains to look into the English books upon this point, and although there may be some exceptions, the general rule certainly is, among the English judges, to express common care and ordinary care by terms less liable to misconstruction, and, as we think, likely to be more justly appreciated by juries. In *Duff v. Budd*, 3 Brod. & Bing. 177, the rule is laid down by Dallas, Ch. J., to the jury, in these words: "Gross negligence is where the defendant or his servants have not taken the same care of the property as a *prudent man would have taken of his own*," and the judgment is affirmed by the full bench. In *Riley v. Horne*, 5 Bing. 217, Best, Ch. J., says of a carrier, "the notice will protect him, unless the jury think that *no prudent person*, having the care of an important concern of his own, would have conducted himself with so much inattention, or want of prudence." In *Batson v. Donovan*, 4 Barn. & Ald. 32, the same learned judge lays down the rule thus: "They must take the same care of it that a *prudent man* does of his own property. This is the law with respect to all bailees for hire or reward." In *Wylde v. Pickford*, 8 M. & W. 448, Parke B. seems to claim a distinction between gross negligence

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and ordinary neglect, but admits that ordinary neglect may be correctly defined in the above cases. But in *Hunter v. Debbin*, 2 Queen's B. 644, Denman, Ch. J., said, in regard to gross negligence, "it might have been reasonably expected that something like a definite meaning should have been given to the expression," "in none of the numerous cases referred to on the subject is any such attempt made, and it may well be doubted whether between 'gross negligence,' and negligence merely, any intelligible distinction exists." But the English cases all seem to agree in defining ordinary negligence as that which a *prudent man* does not allow in the conduct of his own affairs, and most of the later cases, where the question has arisen, both English and American, repudiate the old attempt to distinguish three distinct degrees of diligence and the correlative degrees of negligence. In *Wilson v. Brett*, 11 M. & W. 113, Baron Rolfe makes some very pertinent remarks upon this subject, "I said I could see no difference between *negligence* and *gross negligence*, that it was the same thing, with the addition of a vituperative epithet." And in *Austin v. The Manchester R. R.* 11 Eng. L. & Eq. 513, Cresswell, J. refers to the language of Lord Denman quoted above, with approbation, and in the *Steamboat New World v. King*, 16 Howard U. S. 474, Mr. Justice Curtis seems to adopt a similar view in regard to these distinctions being more or less unintelligible, and in practice often leading to misconstruction and misunderstanding. It seems too that these distinctions are repudiated by many of the continental jurists in Europe, as producing more uncertainty than they cure; 6 Toullier's *Droit Civile*, 239, 11; *id* 203; and although it seems we have adopted these distinctions in the degrees of diligence and negligence from the Roman civil law, I do not find the commentators on that law adopting our loose manner of expressing what is required of a bailee for hire. Domat, part 1, book 1, tit. IV, sec. VIII, art. III, thus expresses the care of such bailees: "He who undertakes to keep cattle, ought to preserve that which is entrusted with all the care that is possible to be taken by persons who are the most watchful and diligent." And this is really synonymous with the rule adopted by the English courts. Mr. Justice Story, *Bailments*, §11, in order to maintain the old definition of three grades of diligence, defines it much in the manner it was done in the present case.

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"Common or ordinary diligence is that degree of diligence which men in general exert in respect to their own concerns," which certainly leaves upon the mind a different impression from the definition of Domat and the English judges, and we cannot but regard it as one calculated to mislead juries; and this very writer, in § 18, adopts the diligence of "prudent men," as the measure of common diligence, and it seems to us nothing short of this will do justice in a case like the present.

It may with some plausibility be said, that one who employs a man known to the employer to be habitually indifferent to the management of his own concerns, has no right to expect him, all at once, even for reward, to assume a wholly different character, and the jury would be likely so to decide, the question being ordinarily one of fact, when the testimony raises any doubt; and when one employs a man of skill and talent in the management of his own affairs, he may justly expect him to exert the same skill and talent, to the same extent in the management of the business which he undertakes for others; and in the case of a public officer who is selected for his fitness for the particular trust, every one may justly expect all the care and diligence, which men entirely competent and careful could reasonably be expected to exert in their own business of equal importance.

The absurdity of this measure of duty in a public officer will become sufficiently obvious, if we advert to the form of the oath, or of the official bond of public officers. What should we think of having one sworn or giving bond to perform his duty as common men ordinarily do such things. This certainly sounds very different from the official oath, "that you will faithfully execute the office to the best of your judgment and ability," and an official bond obliges officers to the strictest, most faithful performance of all of their duties. Any other standard would sound absurd, and it is obvious to us, that the case of *Bridges v. Perry*, 14 Vt. 262, was not intended to impose any different rule of liability upon officers in keeping property. As said in *Drake on Att.* § 273, "The officer must comply with all the requisitions of the law," (one of which is, to keep safely, property attached on mesne process, and restore it when required by law,) "or show some legal excuse for not doing so." Hence in *Sewall v. Marston*, 9 Mass. 530, an offi-

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cer was held bound to keep property attached on meane process, five years before, ready for sale on the execution, and in *Tyler v. Ulmer*, 12 Mass. 163, it was held, an officer could not in such case excuse himself for not producing cattle, by showing that from the scarcity of fodder they could not have been kept alive.

Any injury or loss, in such cases, renders the officer *prima facie* liable, and imposes upon him the burden of showing some valid excuse; *Logan v. Matthews*, 6 Barr 417; Story on Bail. § 411; *Platt v. Hubbard*, 7 Conn. 501, *Burt v. Miller*, 13 Barbour 482. There is undoubtedly some contradiction in the cases, in regard to the burden of proof of negligence in the ordinary case of bailments for hire, but there can be no doubt, we think, in regard to the question in the present case. This is expressly so laid down in *Bridges v. Perry*. The court in that case, as will be obvious from a careful examination, had no purpose of excusing this class of officers from any degree of care and diligence, which careful men would expect under the circumstances.

And this, it seems to us, is the true measure of liability in all cases of bailment. The bailee is bound to that degree of diligence, which the manner and the nature of his employment makes it reasonable to expect of him; anything less than this is culpable in him, and renders him liable. The conduct of men in general in the region where the attachment was made, may be some guide to what ought to be required of the defendant in keeping property attached. We mean, of course, prudent and careful men, for no one is expected to go very essentially beyond the common custom of the country in such matters, as it must be attended with extraordinary expense, and a question might thereby arise as to the propriety of incurring such expense.

Judgement reversed, and case remanded.

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BRUSH M. WEBB v. THE TOWN OF BURLINGTON.

Assessment of trust property. State stocks taxable.

Property bequeathed to, and held by a trustee, the interest or income of which is to be paid to a person during life, and after her decease the principal to be paid to the testator's heirs at law, is assessable, (under Comp. Stat. Chap. 80, § 15,) to the person entitled to the income.

A person residing here, who owns, or is interested in the stocks of other states, may be legally assessed therefor in this state.

ASSUMPSIT to recover money paid by the plaintiff for taxes, assessed against Orissa B. Keeler, his wife. Plea, the general issue; trial by the court, November Term, 1855,—PIERPOINT, J., presiding.

The following facts were agreed upon: William H. Keeler died in 1849, and by his last will gave, among other bequests, ten thousand dollars in the government stock of some one of the United States to Richard G. Cole, in trust, that the interest and income thereof might be for the use and benefit of his wife Orissa B. Keeler, during her natural life, and, upon her death, the principal to be paid to the testator's then heirs at law. His executor, soon after the probate of the will, and in pursuance of its provisions, transferred to said Cole certificates of Ohio state stocks, for \$10,000, bearing six per cent interest, in trust for the said Orissa, as provided in the will. The said Cole accepted the transfer and the trust, and continued to hold the stock, and pay the interest received thereon annually to the said Orissa. On the first of April, 1853, and again on the first of April, 1854, the listers of the town of Burlington, in which the said Orissa resided at the time of, and since both of those dates, set in the lists of that town for those years, "Orissa B. Keeler,—R. G. Cole, trustee,—Ohio state, or other stocks, in the hands of R. G. Cole, as trustee for her, as a trust fund, \$10,000." Upon these lists taxes were duly assessed by the defendants, and tax bills and warrants issued for their collection. In September, 1854, the said Orissa was married to the plaintiff, and in the following January he was compelled to pay, and did pay, to prevent the distraining and sale of the said Orissa's property, the amount of taxes assessed against her on said list.

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Upon these facts, the county court rendered judgment for the defendants, to which the plaintiff excepted.

C. Linsley for the plaintiff.

Personal property is to be assessed to the person who is the owner of it. Comp. Stat. 450, § 4; 452, § 14. It is not intimated in the fifth clause of section 15, (p. 452,) that there is to be any change in the principle of setting property to its owner. "Property held in trust," implies that it is the property of the *cestui que trust*. Mrs. W. is in no sense the owner, nor can she by any possibility become the owner of this stock. It is set apart for the purpose of giving her an annuity, and in trust for the testator's heirs. The stock is not held for her as owner, and to hold that she is taxable for it, would be a departure from the great principle that property shall be taxed to the owner. *Catlin v. Hull*, 21 Vt. 158; *Leverett v. City of Boston*, 18 Pick. 123.

The property being the stock of a sovereign state, ought to be exempt from taxation, on the same ground that the stocks of the United States are. *Weston et al. v. Charleston*, 2 Peters 455-465. *McCullough v. Maryland*, 4 Cond. U. S. R. 466.

G. F. Edmunds for the defendants.

Mrs. Keeler came within the letter of the law, as the person subject to taxation for this property. Comp. Stat. 452 § 15.

The right of taxation is an inseparable incident of sovereignty. It extends to all persons and property within the state; its only limitation (except that it must be equal,) is to be found only in the sovereign will. The states of Vermont and Ohio are absolutely independent of each other; each, in respect to the other, is sovereign and equal, and is bound to no other respect or consideration of the laws or acts of the other, than comity and policy may dictate; and what they do dictate, is a question for the legislature of each state, and not for the courts.

There is nothing in the constitution of the United States, either expressed or implied, which inhibits such taxation.

The opinion of the court was delivered, at the circuit session in September, 1856, by

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REDFIELD, CH. J. I. The first question made in this case is, whether stocks of one of the American states, held by a trustee, under a will, the income of which, only, is to be paid to a married woman, or other person, but the principal of which is, after the the decease of such person, to go into the mass of the estate, and be disposed of, under the will, is to be set in the list, to the person receiving the income, or to the executor of the estate.

The 5th paragraph in § 15 chapter 80 of the Compiled Statutes, seems to us to require the assessment to be made to the person receiving the income. It speaks of the money as being held in trust, but it does not intimate that it must be held in trust, for the person receiving the income, in order to have the assessment made to him. But if held in trust, so that the income is to go to any one, the assessment shall be made to such person, in the town of which such person is an inhabitant. This seems to us purposely so expressed, that it might embrace cases like the present, where the person receiving the income, was never to receive the principal, which is not an uncommon case, and might very naturally have been anticipated by the framers of the statute.

This view might be fortified by the analogies of taxation, generally, falling, as it does, or is intended to, chiefly upon income. And if one person were entitled to the income, and another to the ultimate inheritance, or bequest of the principal, without its returning again into the mass of the estate, no one could question the probable purpose of the legislature, to make the assessment upon the present usufruct.

II. The other question made in the case is one of great importance, and possibly, upon mere comity, not altogether free from difficulty, if the tax upon the owner of state stocks be fairly capable of being viewed as any abridgement of the absolute rights of sovereignty of the state issuing the stock.

But, it seems to us, no such view is fairly maintainable. The sovereignty of a state certainly has no extraterritorial force, or existence. One state has no right, either as an independent foreign sovereignty, or as a member of the great republic of affiliated states, under the constitution, to demand the issue and sale of her public stocks in any other state. The United States government may be

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said to possess this right throughout the states and territories, and a specific tax, imposed by the states, upon any of the instruments or functions of the general government, may, undoubtedly, be fairly regarded as an unwarrantable interference with the paramount sovereignty. For it is impossible to deny that the general national government, within the sphere of its just operation, is supreme and paramount to all other sovereignty. We cannot, therefore, question the soundness of the decision of the United States supreme court, in the case of *McCullough v. The State of Maryland*, 4 Wheaton 316. [4 Cond. U. S. Sup. Court 466.] The United States bank was upheld by the national tribunals as a necessary fiscal agent, to aid the general government in its financial operations. And although these views no longer obtain, there could be no doubt, that while the national government saw fit to employ such an instrument, in the administration of its functions, any specific tax upon its issues was, so far forth, an abridgment of its powers, and an interference with its functions, thus bringing the two sovereignties in direct conflict, and to that extent in collision, which was certainly at variance with the whole theory of the national government. For if the states could hinder and impede the functions, and retard the operations of the instruments of the national government, they might, by parity of reason, wholly destroy them. And this, as was well said by CH. J. MARSHALL, in his very elaborate and satisfactory opinion, in this case, might be effected at any time, by simply increasing the impost, or tax, upon the issues of the bank. But a tax upon the owners of the stock of the bank, in common with the owners of other stocks, or money, could have no such effect. Such a tax would operate equally upon all property in the state, or upon the inhabitants of the state, in proportion to their income, whether from property within the state, or not. For it has often been decided that a state may impose a tax upon its inhabitants for income derivable from stocks, or other property, without the state. And in the conclusion of this opinion the court takes occasion to say, the decision "does not extend to a tax paid by the real property of the bank, in common with the other real property within the state, nor to a tax imposed on the interest which the citizens of Maryland may

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hold in this institution, in common with other property of the same description, throughout the state."

This decision does not intimate any ground upon which a state could be deprived of the right to tax its inhabitants for income resulting from United States bank stocks, or even from their own stocks. But the case of *Weston v. The City of Charleston*, 2 Pet. 449, seems to go further, and to prohibit a tax upon income derivable from United States stocks. But this is placed upon the same ground as the specific tax upon the issues of the United States Bank. But it has no application to stocks issued by the states.

And the rule, as applied to the owners of United States stocks, is certainly not without serious ground for question, as the dissenting opinions of Messrs. J. J. JOHNSON and THOMPSON show. And when, if ever, the national stocks shall be swelled to the enormous extent of many European countries, so as to absorb the larger proportion of the national wealth, in personality, it would certainly demand serious consideration, whether any such rule is maintainable, upon just and fair principles of reason and justice, but it seems to be settled as authority, so far as the U. S. supreme court is concerned. But it has always seemed to me that the opinions of J. J. JOHNSON and THOMPSON, and CH. J. MARSHALL, in *McCullough v. Maryland*, all which admit that United States stocks, considered as a source of income, may form the basis of personal taxation, contain the soundest view of the subject, and that it will finally prevail in that court.

Judgment affirmed.

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THE VERMONT CENTRAL RAILROAD COMPANY v. THE TOWN
OF BURLINGTON.

Exemption of the Vermont Central Railroad Company's property from taxes. Liability of towns for taxes improperly assessed.

The provision in the 17th section of the act incorporating the Vermont Central Railroad Company, that its property and effects shall be exempt from taxes, limited, in its application to real estate, to such as the company were authorized to take by proceedings in *in rem*.

Application of this limitation to the facts in the present case.

The plaintiffs having, under protest, paid to the collector of the defendants the taxes assessed upon their property which was exempt from taxation, can recover back of the defendants only such of the taxes as were collected for their benefit, and not the state, county and state school taxes, which the defendants had collected only as agents, and had paid over as directed by statute.

ASSUMPSIT for money had and received, money paid, &c., and trial by the court, November Term, 1855, upon the following agreed statement of facts.

On the 15th of June, 1854, S. W. Taylor, who was then the constable of Burlington, had in his hands rate bills and warrants for the collection of several state, state school, county, town and highway taxes assessed against the plaintiffs in the town of Burlington. He had then levied upon and advertised property of the plaintiffs, to satisfy said taxes and his fees for collecting them. On that day, the plaintiffs paid the amount of said taxes and fees to Taylor, under protest. Said taxes were afterwards, and before this suit was brought, paid over by Taylor as directed by the various rate-bills and warrants in his hands.

These taxes were made up on various lists of the plaintiffs and Clark & Paine, made up by the listers of Burlington, in the years 1851-2-3.

The various pieces of real estate described in said lists, were the property of the plaintiffs in fee, until August, 1852, when they were conveyed by the plaintiffs to Clark & Paine, in trust, to secure certain sureties of the plaintiffs, and in 1853 said lands were assessed to Clark & Paine, as trustees, and, with one exception, are within or adjoining the line of location of the plaintiffs' railroad in the town of Burlington, over which the track passes,

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Some of said pieces are wholly within the six rods which, by their charter, the plaintiffs were authorized to take for their roadway. The track passes over all the pieces named in the lists, some parts of them being without the line of six rods. Upon three of these lots, buildings were standing, some portions of which buildings are within, and some portions without the six rods. One of these buildings is, and always has been, since the construction of the road, used for their station-house and passenger depot.

All said estate was acquired by the plaintiffs by purchase from the owners, except the piece designated in the lists as the Nye place, which was obtained by an appraisal of the commissioners under the plaintiffs' charter.

In those cases where the lots lay wholly within the six rods, they were purchased because the plaintiffs regarded that width necessary to the convenience and safety of their track, and that is the width of the entire line of their road through the state.

Where the lots extend beyond the six rods they were purchased by the plaintiffs because that mode was thought more economical than paying the damages, and because the whole lots could be purchased by the plaintiffs as cheaply, or nearly so, as the six rods would be appraised by commissioners.

The eleven acre piece was a piece of swamp land lying in the north part of the town, through which the plaintiffs first located their road, and was acquired by the plaintiffs by purchase in the same manner as the other pieces. After this purchase, the plaintiffs changed the location of the road, so as not to run through this eleven acres, and this piece has ever since been common and unimproved by the plaintiffs. When purchased, a part of it was necessary to the construction of the plaintiffs' road.

All these pieces of real estate were acquired by the plaintiffs in good faith, because it was more economical for them to do so than to limit themselves to the six rods, and take the land upon the commissioners' appraisal; and not for the purpose or with the intent of acquiring property which should not be subject to taxation.

In making up these lists, the listers appraised such parts of these lots as in their judgment were not necessary for their roadway, or for depot purposes, including in their appraisal a considerable por-

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tion of lands within the six rods, and in all cases where the lots extended beyond the six rods, the surplus was included in the lists.

If, upon these facts, the plaintiffs are entitled to recover, the cause is to be referred to assess the damages, under such rules as the court shall establish affecting the plaintiffs' right to recover.

That part of these lots, outside of the six rods limits of the road, was not necessary to the proper use or accommodation of the road, except the town lot, so called, which, for the purposes of this trial, it is conceded was necessary for a depot, and that part inside the six rods limits was necessary for the proper use and accommodation of the road.

Upon this statement of facts, the county court rendered judgment for the defendants. Exceptions by the plaintiffs.

Roberts & Chittenden for the plaintiffs.

Section seven of the plaintiffs' charter authorized them to lay out their road six rods wide, and they judged that width necessary. Their determination upon this point is conclusive. If, therefore, the power to tax depends on the necessity of the property for the use of the railroad, the tax upon any part of the six rods strip was illegal, and also that upon the town lot used for depot purposes. The lands without the six rods were acquired in the exercise of a wise economy in obtaining the road-line itself, and may be, therefore, said to have been necessary, in a certain sense, for the construction of the road.

But the plaintiffs are not limited by their charter from taking and holding other lands than those which are necessary for the construction and accommodation of their road, and the true question is, are these lands the property of the plaintiffs? If so, by section seventeen of their charter, they are not taxable. The defendants have treated them as the plaintiffs' property, and set them in the list as such. The right to take and hold lands is incident to the corporate character of the plaintiffs, unless restrained by the charter, either expressly or by implication. So far from being restrained, the power is expressly given, as above stated.

There is no power given to Burlington to tax certain parts, or any part of the plaintiffs' property, whether necessary to their use or not; if they own it at all, it is exempt from taxation.

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These points are fully confirmed by the following cases. *Gardner v. The State*, 12 W. L. Dig. 404, *New Jersey*; *Inh. of Worcester v. Western R.*, 4 Met. 564; *Reading R. v. Berks County*, 6 Barr; *Wayne County v. Del. & H. Canal Co.*, 15 Penn.; 3 Harris 351.

If the lists embraced any lands not subject to taxation, the whole list, in this case, is void, because the illegal is so blended with the legal that it is quite impossible for the court to separate them. *Drew v. Davis*, 10 Vt. 506.

G. F. Edmunds, for the defendants, argued that the lands which the plaintiffs were authorised, by their charter, to purchase or take by force of law, were only such as were necessary for the construction of their road and the accommodation requisite and appertaining to the same; that this right was limited to lands upon their line of location, and not exceeding six rods in width,—and that, within those limits, their power of acquisition was to be measured by their necessities; that the property exempted from taxes was such only as the company were authorised to acquire; and that the general words used in the charter should be restrained to the subject to which they were intended to apply, which was to lands given to the company, or to such as were necessary to the use of their road; and cited *State v. Mansfield*, 3 Zabriskie 510. (14 U. S. Dig. 545.)

The opinion of the court was delivered, at the circuit session in September, 1856, by

ISHAM, J. This action is brought to recover the money which was paid by the plaintiffs in discharge of taxes assessed upon their property by the selectmen of the town of Burlington. The money was paid under protest; and, if the taxes were laid in whole or in part on property exempt from such assessments, the plaintiffs are entitled to recover. The 17th section of the charter of this company provides that, "The stock, property and effects of the company shall be exempt from all taxes levied by, or under the authority of this state." If full effect is given to that language, it would seem to create an exemption co-extensive with their right to hold property in their corporate capacity. That provision, however, should be construed so as to carry into effect the intention of

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the legislature. The plaintiffs, by their charter, are made a body corporate, with power to construct a railroad for the transportation of persons and property, and are authorised to make the necessary surveys, and to lay out their road, not exceeding six rods in width, through the whole length of the line. By the 7th section, the company are authorised "to take possession and use all such lands and real estate as may be necessary *for the construction of the road and the accommodation requisite and appertaining to the same,*" and, in case of a disagreement as to the price of the land, the matter is to be determined by commissioners. They may also take and hold such real estate as may be granted or given to them to aid in the construction, maintenance and accommodation of the road. The 17th section, after exempting the property of the company from taxation, provides that the legislature, after the expiration of twenty years from the opening of the road, may purchase of the company the road, and all franchises, property, rights and privileges thereto belonging, on payment of the amount expended in making the same, the expenses of repairs, with all other expenses incurred about the same, and ten per cent interest thereon; deducting therefrom the sums received from tolls and other sources of profit.

In relation to charters of this character, and the roads constructed under them, we have had occasion heretofore to observe that, though the capital and the income belongs to individuals themselves, and are used for private gain, yet the construction of these roads is regarded as a public work, established not only by public authority, but for public use and benefit. The title of the property is vested in the corporation, but for public use. The property, so far at least as they are authorised to take it by proceedings *in invitum*, and the franchises granted to them, can be used in no other way, and for no other purposes. It was probably this consideration, as well as the additional one, that the amount paid in taxes would increase the sum to be paid by the state in case they should become the purchasers of the road, that induced the legislature to exempt the property from these charges. We are not to understand by this, that all the property of which the company may become the owners, and which they may hold under their charter, will fall within that exemption. There must be some

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limit to its operation. It should be confined to that which the company were authorised to take without the consent of the owner, and to which the state would be entitled, on becoming the purchasers of the road. While the company may hold property of that character exempt from taxation, they may at the same time hold, by gift or grant, wood land for fuel, or land on which to erect tenements for those under their employment, and for various other purposes connected with the use of the road, and to which that exemption does not apply. Property of that character is not held in trust for public use. The company are at liberty to dispose of it for other purposes than the use of the road; nor would the state be entitled to become its purchasers on paying its cost. That right would extend only to that property which they were authorised to take in the exercise of the right of eminent domain; and that is the extent to which that exemption should apply. The cases which have been decided on this subject lead to this conclusion. In the case, *State v. Commissioners of Mansfield*, 3 Zabriskie 510, it appeared that in the charter of the Camden & Amboy Railroad Company it was provided that "No other tax or impost shall be levied or assessed upon the said company." It was held that the exemption applied only to property which was necessary to effect the purposes of their organization;—POTTS, J., observing that, "the legislature, in exempting the company from all other taxes, only intended to include so much property as was necessary and essential to a railroad and transportation business, such as the corporation was created to construct and carry on; and, that the limitation of that exempting clause must be fixed, where the necessity ends, and the mere convenience begins." In the case, *Railroad v. Berks County*, 6 Barr 70, it was held that, as the railroad was exempt from taxation, that property only which was necessary and indispensable to the construction and use of the road was within the exemption. In the case of *Inhabitants of Worcester v. The Western R. Corporation*, 4 Met. 564, an assessment was made on the passenger depot, and the freight, car and engine houses in Worcester, standing partly within and partly without the line of the railroad location. The commissioners abated the tax upon all buildings lying within the limits of the road, and confirmed the tax upon all buildings without the limits of the location. CH. J. SHAW, after

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observing that the road was a public work, intended for public use, and that, as such, it was exempt, with all its necessary incidents, from taxation, remarked that "the limit of that exemption is to be ascertained by considering the *extent of the public easement* intended to be acquired, and the *franchises granted* to the proprietors, to enable them to accomplish the proposed end." It was also held that, *the extent to which the company are authorised to take land without the consent of the owner, is the extent to which the law regards the land as appropriated to public use.* In relation to property *acquired by purchase*, lying without the limits of the location of the road, the court observed that "such buildings, or other real estate will not be considered as necessarily incident to the railroad and its objects, and therefore will not be exempted from taxation." We think that view of the subject is satisfactory, and carries into effect the intention of the legislature in making that provision. When, therefore, in the charter of this company, the legislature exempted the stock, property and effects of the company from taxation, reference was had, so far as real estate was concerned, to that which they were *authorised to take by proceedings in invitum*, and does not extend to other land, which they may take by grant, and which may or may not be a matter of convenience, or a source of profit.

It appears from this case, that the selectmen in making up the list, and in the assessment of the tax against this company, appraised various lots of land belonging to the company, most of which were without the limits of the six rods which they were authorised to take for the construction of their road. In relation to that property, it is expressly stated in the case that the land was not necessary for the proper use or accommodation of the road, except the town lot, which it was conceded was necessary for a depot. We think, upon the principles which have been stated, the taxes were properly assessed upon that property. It also appears that, in that appraisal, the selectmen included a considerable portion of the six rods included within the line of the railroad location. For that land, as also the town lot, which it is agreed was necessary for a depot, the corporation are not liable to be assessed, nor for any buildings or structures erected thereon, if necessary for the support or convenient use of the road. Whether it would be

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liable to taxation if any part of the land included within the six rods were actually used and appropriated to purposes other than the construction, maintenance and accommodation of the road, is not a question arising in the case, as there is nothing stated showing that such use was made of it. To that extent, therefore, we think the taxes were improperly assessed. The recovery in this case, however, must be limited to the money received for the use of the town. The town is not liable for the state, county, or state school taxes, nor where the town collected the money as agents, and have paid over the money as required. *Spear v. Braintree*, 24 Vt. 419; *Fairbanks & Co. v. Kittredge*, 24 Vt. 10. The result is, that the judgment must be reversed, and the case referred for the assessment of damages, as stipulated by the parties in the case stated.

THE MICHIGAN STATE BANK v. JOHN PECK, JOHN H. PECK,
AND EDWARD W. PECK.

Letter of Credit.

The defendants and H. W. C. signed and delivered a writing of the following tenor:
"C. C. Trowbridge, Esq., President, Detroit, Michigan. B. H. & Co., are authorized to value upon us, or either of us, to the amount of \$25,000, in such amounts
"and on such time as they may require, which will be duly honored, and we hereby
"jointly and severally hold ourselves accountable for the acceptance and payment
"of such drafts."

Held

1. That it might be shown by parol, that the writing was intended for the plaintiffs of whom the said Trowbridge was president.
2. That the writing bound all the signers to the payment of such drafts as might be accepted by either of them.
3. That it was not answered by the acceptance and payment of drafts to the amount of \$25,000; but that that it was a standing or continuing guaranty for that amount, the parties themselves having so treated and practically construed it.
4. That it extended to, and provided for the payment of drafts made payable else

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where than at the residence of the drawee, which had been accepted generally, and recognized, and were obviously conformable to the expectation of the parties. [See *same plaintiff v. Estate of Leavenworth*, post p. 209.]

ASSUMPSIT. The facts in the case were agreed upon as follows. The plaintiffs hold three notes against the defendants for \$3,000 each, dated August 15, 1854, due in thirty, forty and fifty days, respectively, after said date, for amount due upon which the plaintiffs are entitled to judgment.

On the 25th day of January, 1854, the defendants, under their firm and style of J. & J. H. Peck & Co, and one H. W. Catlin, executed and sent to Roelofson, Hatch & Co., of Detroit, who delivered the same to the plaintiffs, at the said Detroit, in the state of Michigan, a paper of the following tenor, viz.

Burlington, Vt., Jan. 25, 1854.

C. C. Trowbridge, Esq., President, Detroit, Michigan.

Dear Sir:—Messrs. Roelofson, Hatch & Co., of Detroit, are hereby authorized to value upon us, or either of us, to the amount of twenty-five thousand dollars, in such amounts, and on such time as they may require, which will be duly honored, and we hereby jointly and severally hold ourselves accountable for the acceptance and payment of such drafts.

Yours respectfully,

(Signed)

J. & J. H. PECK & Co.

H. W. CATLIN.

C. C. Trowbridge, was, and has since been the president of the plaintiffs' bank. The paper was received and accepted by the plaintiffs from Roelofson, Hatch & Co., before the fourth day of March, 1854, and has been held by them ever since.

Upon the credit and faith of this paper, the plaintiffs discounted and paid to said Roelofson, Hatch & Co., at Detroit, relying upon said paper, for each discount, bills of exchange, as follows,

Date of bills.	Drawers.	Drawees.	Am't.	Due.	When paid, if paid at all
1854.				1854.	1854.
Mar. 4,	Roelofson, Hatch & Co.	J. & J. H. Pecks & Co.	\$5000	May 7,	May 6.
May 2,	"	"	"	5000	July 5, July 5.
Feb. 11,	"	"	"	2500	May 14, May 15.
Feb. 25,	"	"	"	4500	May 23, May 27.
Mar. 10,	"	"	"	2500	Ap'l 12, Ap'l 12.
Mar. 10,	"	"	"	2500	Ap'l 27, Ap'l 27.
Mar. 11,	"	"	"	3000	Jun. 14, Jun. 14.

\$25,000.

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Date of bills.	Drawers.	Drawees.	Am't.	Due.	When paid, if paid at all.
1854.				1854.	
May 3,	Roelofson, Hatch & Co.	H. W. Catlin.	\$5000	July 11.	
May 26,	" " "	" "	1000	July 29.	
June 3,	" " "	" "	2000	July 16.	
June 3,	" " "	" "	2000	July 28.	
June 8,	" " "	" "	2000	Aug. 5.	
June 19,	" " "	" "	3000	Aug. 22.	
June 13,	" " "	" "	5000	Aug. 18.	

\$22,000 Not paid.

all of which bills, except the seven last mentioned, were duly paid, as stated, and said seven bills last mentioned have never been paid, and have ever been held by the plaintiffs. These seven bills were all duly accepted by Catlin, and duly protested for non-payment, and notice thereof was duly given to all the parties.

On the 15th of August, 1854, the first five of said seven bills being overdue, the plaintiffs applied to Catlin and the defendants for payment, according to said paper; and the said Catlin, and the defendants, then and there, in order to secure the payment of said overdue bills, executed and delivered to the plaintiffs their four promissory notes of an amount equal to said overdue bills, as collateral security; which notes are still held by the plaintiffs, and are unpaid; and the defendants were then informed by the plaintiffs that said two other bills of exchange, last mentioned, had been drawn by said Roelofson, Hatch & Co., under said paper, and had been discounted and were held by the plaintiffs.

After said two bills fell due and were dishonored, and in the latter part of September, 1854, the plaintiffs, by their attorney, applied to J. H. Peck, the partner in the defendants' firm having the principal management of the financial affairs of the defendants, for payment of the two bills last mentioned, amounting to eight thousand dollars, and interest, under, and according to said paper, whereupon the said J. H. Peck promised said attorney, that the same should be paid, and the whole twenty thousand dollars of said dishonored bills retired within ten days or two weeks thereafter.

Upon the foregoing case stated, the county court, November Term, 1855,—PECK, J., presiding,—rendered judgment for the plaintiffs to recover \$9,743.75, being the amount due on said three promissory notes.

Exceptions by the plaintiffs.

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Geo. F. Edmunds for the plaintiffs.

From the situation and business of the parties, and the circumstances attending the transactions,—all of which are admissible to aid in the construction of a contract—it is evident that a running line of discounts, not exceeding in amount twenty-five thousand dollars, was intended to be obtained on the faith of this contract. The contract itself looked wholly to the future, and to such sums and time as the necessities of the business should require, and, upon its face, fully warranted this construction.

The limitation is a limit of responsibility, and not a limit of the total sum of the bills to be drawn. The twenty-five thousand dollars is a standing credit, and up to that amount the parties are authorized to draw, from time to time, *ad libitum*; and drafts thus drawn, the defendants promised to pay. 7 Pet. 113, *Douglas v. Reynolds*. 12 East 227, *Mason v. Pritchard*. 7 Greenleaf 115, *Tuckerman v. French*. 1 Met. 24, *Bent. v. Hartshorn*. 6 M. & W., *Mayer v. Isaac*. 2 Gibbs 504, *Farmers & Mechanics' Bank v. Kercheval*.

A transposition of the words of the contract relieves it from doubt; thus—"R., H & Co. are hereby authorized to value on us, or either of us, in such amounts, and on such time, as they may require, to the amount of twenty-five thousand dollars," &c. In commercial contracts, drawn by commercial men, language could scarcely be clearer, to indicate a continuous liability.

Again, the expression "*to the amount of twenty-five thousand dollars,*" instead of *for the amount*, clearly shows that amount to have been named as the limit of a continuing liability, rather than as a specific sum for which the bills were to be drawn.

The acts of the parties, having full knowledge of the facts, are decisive in support of the construction we claim. The intention of the parties, is, in all contracts, especially commercial ones, the pole-star of construction; and in ascertaining that intention, courts always hold them to their own construction of their obligations. 16 Vt. 95, *Austin v. Wheeler*.

That such facts are proper, and often essential aids in arriving at the true intent of the parties, in cases of doubt, has been so often declared by the tribunals of all countries, that authorities need scarcely be referred to. *Bell v. Bruen*; *Lawrence v. McCal-*

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mont, 2 How. 426; 22 Vt. 160, *Lowry v. Adams*; are a few of the many cases which support this position.

The acts of the defendants were a full and complete ratification of the authority assumed, (rightfully we think,) by Roelofson, Hatch & Co., in drawing these bills under this contract.

To the objection that the bills are not of the description mentioned in the contract, in that they are made payable in New York, we reply:

1. The acts of the parties, as upon the other point, have given the contract a practical construction, pointing to New York as a place of payment.

2. There is no limitation in the contract itself; it is a general authority to draw; and, under such an authority, it rests with the defendants to show that the place of payment was not usual in the course of business, and such as the parties could not have contemplated. 15 Conn. 475, *Bridgeport v. Housatonic R. Co.*

3. It is an inseparable incident to the right to draw, that the drawer, (unless special provision is made,) may appoint the place of payment. In *Edmonston v. Drake*, a place of payment was agreed upon. In *Launusse v. Barker*, the direction was to draw on Tabor & Son, Portland. The court say that this was a specific direction to draw upon Portland, and must of course be followed. But in the present case, the contract is silent as to the place where the bill should be payable, and purposely so, no doubt, in order that the parties might draw upon the various markets in which their funds might be received in the course of their trade.

"Had such been the intention, it is but reasonable to suppose that the limitation would have been expressed in the contract;" *Lyman v. Sherwood*, 20 Vt. 42. See, too, 2 C. & J. 11, *Thompson v. Manley*.

The promise to pay was a waiver of any such objection, and a ratification of the act of Roelofson, Hatch & Co. in drawing these bills under the contract.

J. Maack and S. Wires for the defendants.

L. Plaintiffs have no right to sue upon this guaranty, it not being a general guaranty or letter of credit, authorizing any person to discount on the faith of it, but addressed to a particular individual by name; *Walton v. Dodson*, 14 E. C. L. 250; *Grant v. Naylor*,

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2 Cond. 95; *Hall v. Rand*, 8 Conn. 574; *Walsh & Beekman v. Bailie*, 10 Johns. 180.

II. If it is to be treated as a general letter of credit, authorizing any person to whom it is shown to discount bills drawn by R. H. & Co., on the faith of it, then only such of the signers to it as the bill is drawn upon, are bound to accept and pay the same. See *Coolidge v. Payson*, *Lawrason v. Mason*, and the notes to those cases, 2 Am. Lead. Cases from p. 197 to 232.

III. The guaranty or letter of credit, limiting the right to draw, in all, to the amount of \$ 25,000, and that amount having been drawn and paid, the instrument became *functus officio*; *Boville v. Turner*, 18 E. C. L. R. 308; *Melville v. Hogden*, 5 E. C. L. R. 389; *Kirby v. Marlborough*, 2 M. & S. 18; *Kay v. Groves*, 19 E. C. L. R. 82; *Rogers v. Hamer*, 8 Johns. 92; *Douglass v. Reynolds*, 7 Peters 113; *Hall v. Rand*, 8 Conn. 560; *Cremer v. Higgingson*, 1 Mason, 323; *Russell v. Perkins*, 1 Mason, 368.

This case is wholly distinguishable from all the cases which have been held continuing guaranties. In those cases it will be seen that the guaranty contemplates an indefinite amount of dealings, and the guarantor becomes responsible either for the whole balance which may be due, or for a definite amount of that balance. Such are the cases of *Merle v. Wells*, 2 Camp. 413; *Mason v. Pritchard*, 2 Camp. 436; S. C. 12 East. 227; *Douglass v. Reynolds*, 7 Peters 113; *Mayer v. Isaac*, 6 M. & W. 605; *Ropelye v. Bailey*, 5 Conn. 149; *Allen v. Keating*, 23 E. C. L. R. 401.

IV. The drafts are not drawn in pursuance of any authority conferred. The defendants living here, the drafts should have been made payable here; *Lanusee v. Barker*, 4 Peters 214; *Edmonson v. Drake*, 5 Peters 624.

The opinion of the court was delivered, at the circuit session in September, 1856, by

REDFIELD, CH. J. This is an action by which the plaintiffs seek to recover of the defendants, the amount of certain acceptances of H. W. Catlin, upon a guaranty signed by Catlin and themselves, and addressed to C. C. Trowbridge, President, Detroit, Michigan, in these words, "Dear Sir—Messrs. Roelofson, Hatch & Co., of Detroit, are hereby authorized to value upon us, or either of us to the amount of \$25,000, in such amount and on such time,

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as they may require, which will be duly honored, and we hereby jointly and severally hold ourselves accountable for the acceptance and payment of such drafts," signed by the defendants, and by Catlin.

The person to whom this letter was addressed, was, at the time, president of the plaintiffs' bank. The letter was given to the hands of Roelofson, Hatch & Co., and by them delivered to the plaintiffs, who, upon its credit, discounted the paper in question.

I. The first question made in the case is, that the guaranty does not appear, upon its face, to be intended for the plaintiffs, and that it is not competent to show that such was the intention of the signers, by extraneous evidence. But contracts of this kind have never been held subject to the same rules of construction, in this respect, as negotiable paper. And in regard to such paper, even in this state, it has been decided that it may be sued in the name of the real party to the contract, although his name does not appear upon the note or bill; but the general rule of the commercial law is undoubtedly otherwise.

But in regard to a guaranty of this kind, it follows the general rule of the law in regard to simple contracts, which is, that they may be sued either in the name of the nominal, or of the real party. And in the case of oral contracts, it has been considered, that it is not important whether the agency of the promisee were known to the promisor, at the time of entering into the contract. And perhaps the rule may be equally applicable to written simple contracts. At all events, there can be no question that where the agency or trust appears upon the face of the contract, thus indicating an abbreviation or imperfection, so to speak, being, as it were, a call for proof aliunde, that such proof may be introduced as the basis of giving effect to the contract, by showing the sense in which the terms are used. And, in the present case, the letter of credit being addressed to the person as president, and the proof showing him president of the plaintiffs' bank, and of no other institution, it renders it certain that it was intended for the plaintiffs' benefit. If any doubt had arisen upon the proof upon this point, as if he had been president of two banks at Detroit, such doubt might perhaps, properly enough have been solved by further proof upon the point, as to which particular bank the letter

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was in fact addressed. But no such question arises here. The case of *Walton v. Dodson*, 3 C. & P. 162, so far as it can be regarded as any authority, being a mere *nisi prius* case, is certainly in favor of the views we take. A guaranty addressed to one partner, was allowed to enure to the benefit of both, upon the ground that they had acted upon the faith of it, and that it obviously was intended for both. So, too, in this case, a general guaranty, addressed to no one in particular, was allowed to enure to the plaintiff's use; GASDEE, J., saying, "Such a guaranty will enure to the benefit of those to whom, or for whose use it is delivered." The other cases cited do not seem applicable. The case of *Grant v. Naylor*, 4 Cranch 224, was where the guaranty was, on the face of it, by mistake, probably, addressed to some other persons than the plaintiffs, and the court held that this mistake could not be set right in a court of law, by oral proof of the intention of the guarantors to address their letter of credit to the plaintiffs. This is in conformity to the long-established rule of law upon the subject. The case of *Hall v. Rand*, 8 Conn. 560, 574, does not seem to have any application to this subject. HOSMER, CH. J., there argues against the admission of oral proof as the basis of construction of the written contract, upon the ground that there is no necessity for any such resort, the contract being explicit upon its face, and the proof being offered to give an operation beyond, and inconsistent with its terms. And the case of *Walsh v. Bailie*, 10 Johns. 180, is where the guaranty was attempted to be applied to transactions altogether one side of its scope.

II. The question whether the guaranty was intended to bind the signers to the payment of drafts and acceptances to which they were not parties, in form, is one of some nicety, and, upon the terms used, not free from difficulty. But, it seems to us that to give effect to all the terms used, which is ordinarily to be done when it can be, we must conclude that something more was intended than an agreement to accept such bills as were drawn upon both, or either of them, and pay such as they had themselves accepted. If this had been all which was intended, it is scarcely supposable that business men, such as those concerned seem to have been, or, indeed, that any one, should have resorted to so much unnecessary verbiage. The last clause of the guaranty

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evidently goes beyond the mere acceptance and payment of such drafts as were addressed to the parties signing; else why stipulate for payment, since the acceptances by themselves bound them to pay. It is obvious that this portion of the contract was intended to bind both signers to the payment of all acceptances made by either. And the conduct of both parties shows very fully that they so understood the contract, else the bills would probably have been drawn jointly, so as to secure the responsibility of both; and, if not so drawn, and the defendants did not expect to be responsible for the acceptances of Catlin, it is altogether incomprehensible that they should, upon the first application, without objection, have executed their notes for \$12,000 of such acceptances.

III. The question whether this was intended to be a continuing or standing guaranty, to the amount of \$25,000, if it were not that the parties have so treated it, would certainly be attended with difficulty. The terms used would certainly more naturally incline me to regard it as a single guaranty for \$25,000, and there to end. The provision, in allowing Roelofson, Hatch & Co. to draw for such amounts, and on such time as they might require, seems to me entirely consistent with that view. It is simply saying, it need not all be in one draft. But when we find the plaintiffs acting upon it as a continuing guaranty, and the defendants assuming the drafts, without objection, it is impossible to doubt that it was so intended by all the parties. And, as the terms used are altogether consistent with such construction, we think the practical construction given it by the parties must be held binding upon them. It would be strange if it were not so, under the circumstances. After the defendants had given their notes for \$12,000, and one of the partners and their cashier had given the fullest assurance that the remainder should be provided for in ten days, without any query or claim of exemption, and the plaintiffs had thus been quieted by such a practical construction of their guaranty, it would be little less than a fraud to allow the defendants to now stand upon the strict and literal construction of the letter. We have found no case where the parties have been allowed to repudiate any such long standing and unequivocal practical construction of their contract. And we are so fully persuaded that it could not fail to be of evil example to allow any such thing, in courts of justice, that

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we shall be slow to adopt any such conclusion without precedent. *Douglass v. Reynolds*, 7 Peters 113, is a full authority for allowing the practical construction of this contract to define the extent of the terms used.

IV. If it be true that, upon the face of this letter of credit, the drafts were naturally to be made payable at the counting-house of the drawees, which is certainly the common course of business, it is what the parties themselves might surely waive, or they might, in the acceptance, limit the place of payment if they chose so to do. But, having made a general acceptance of the bills, and then executed their notes for \$12,000, and given assurance of paying the remainder in ten days, it would certainly now be a remarkable defense to prevail, that the bills were made payable in New York. In practice, it is, I think, not uncommon, where paper is negotiated through banks to assist merchants in making extensive country purchases of produce, to remit funds to the cities where such purchases become available, and where the banks often require most of their funds, which may explain the present case consistently with the understanding of all concerned. The conduct of the parties shows very clearly that the bills were drawn in conformity to the expectation of the parties, and that is such a practical construction of the meaning of the contract as will bind the defendants, the same as if they had accepted these very bills.

Judgment for the sum due.

THE MICHIGAN STATE BANK v. THE ESTATE OF HENRY
LEAVENWORTH.

Letter of credit. Revocation by death of signer. Discharge of surety.

A person holden as surety on a letter of credit will be discharged if, without his consent, after the maturity of the paper, for the payment of which he is holden, the

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holder receive as collateral security for its payment another obligation with other sureties payable at a future time.

The death of a person who has given a letter of credit authorizing another to value on him to a certain amount for a limited period, and agreeing to accept the drafts drawn, and pay them if not paid by the drawer at maturity, will operate as a revocation of all authority to thereafter draw on him, though the person to whom, and for whose security the letter was given, has no notice of the death, and the period for which the authority was given is unexpired.

Such a letter of credit dated and given in this state to a person in Michigan, specifying no place at which the drafts are to be made payable, will not bind the signer to the acceptance, or payment of drafts payable in New York; *ISHAM J.* (But see *same plaintiff v. Pecks* ante p. 200.)

APPEAL from the decision and report of the commissioners appointed to examine and adjust claims against the intestate's estate. The facts in the case were agreed upon, and were as follows.

A paper of which the following is a copy

"*Burlington, Vt.*, 24th December, 1853.

"To the President and Directors of the Michigan State Bank.

"Gents:—We authorize Messrs. Roelofson, Hatch & Co., of Detroit, to value on us or either of us, through your bank, at any time before 1st Jan. 1855, for such sum or sums, as they may see fit, not exceeding in the aggregate at any one time thirty thousand dollars, and on such times as they may find necessary; and such drafts, drawn upon us individually or otherwise, we, for value received, jointly and severally agree to accept and pay if not paid by the drawers at maturity."

"W. H. WILKINS, Jr.

"H. W. CATLIN,

"H. LEAVENWORTH."

was, at its date, executed by the persons whose names are annexed to it, and sent by the said Catlin to the said Roelofson, Hatch & Co., at Detroit, Michigan, by whom it was duly received, and by them it was, soon after its date, at said Detroit, delivered to and accepted by the plaintiffs. The intestate was only a surety on said paper, and this was known to the plaintiffs at the time they received it. Upon the faith and credit of said paper, the plaintiffs, at the request of Roelofson, Hatch & Co., discounted and paid to them, at Detroit, bills of exchange according to the following table;

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Date of bills.	Drawers.	Drawees.	Am't.	Due.	When paid, if paid at all.
1854.				1854.	1854.
Mar. 4.	Roelofson, Hatch & Co.	J. & J. H. Pecks & Co	\$5,000	May 7.	May 6.
May 2.	"	"	5,000	July 5.	July 5.
Feb. 11.	"	H. W. Catlin,	2,500	May 14.	May 16.
Feb. 25.	"	"	4,500	May 28.	May 27.
Mar. 10.	"	"	2,500	Apr. 12.	Apr. 12.
Mar. 10.	"	"	2,500	Apr. 27.	Apr. 27.
Mar. 11.	"	"	3,000	June 14.	June 14.
			\$25,000		
1854					
May 8.	"	"	\$5,000	July 11.	
May 25.	"	"	1,000	July 29.	
June 2.	"	"	2,000	July 16.	
June 2.	"	"	2,000	July 26.	
June 3.	"	"	2,000	Aug. 6.	
June 19.	"	"	3,000	Aug. 22.	
June 18.	"	"	5,000	Aug. 16.	
			\$20,000.	Not Paid.	

The last mentioned seven bills were dated at Detroit, Michigan, made payable at the Empire City Bank, New York, and were duly accepted by Catlin, and were presented for payment when due, and payment thereof demanded, and refused, and were duly protested therefor, and all the parties thereto were duly notified of the dishonor thereof; and said bills had ever been and were still owned and held by the plaintiffs, and were unpaid. On the 10th day of May, 1854, the intestate died at Burlington, where he had theretofore resided and done business, but the plaintiffs had no knowledge or notice thereof, until after the discount of all of said bills.

On the 15th of August, 1854, the plaintiffs applied to Catlin and to the firm of J. & J. H. Peck & Co., who had signed a similar writing in reference to these same drafts, (see *ante* p. 200) for security in respect of the said bills then overdue and unpaid, when said Catlin executed, and said Pecks & Co. endorsed and delivered to the plaintiffs, (who accepted them,) four notes, for the purposes, and on the terms stated in the receipt executed by the plaintiffs' agent at the time, which notes had ever since been held by the plaintiffs duly protested and unpaid; said receipt being as follows,

"Received, Burlington, Vt., August 15, 1854, from H. W. Catlin, Esq., 4 notes of \$3,000 each, payable at the Bank of the Republic in the city of New York,

" September, 14-17	\$ 3,000.
" 24-27	3,000.
" October, 4-7	3,000.
" 14-17	3,000.

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"endorsed by Messrs. J. & J. H. Peck & Co., and W. H. Wilkins, "as collateral security to the payment of certain papers drawn by "Roelofson, Hatch & Co., of Detroit, upon said Catlin and now under protest."

During the time of these transactions, the plaintiffs were located and doing business at Detroit, in the State of Michigan, and the other parties resided at, and did business in said Burlington.

The said Roelofson, Hatch & Co., J. & J. H. Peck & Co., W. H. Wilkins and H. W. Catlin, were jointly interested and co-partners in the business for which the money obtained upon said bills was used, and were principals, and the intestate was the only surety.

Upon these facts, the plaintiffs claimed to recover the amount due on said seven bills of exchange; but the county court, November Term, 1855,—PECK, J., presiding,—rendered judgment for the defendant. Exceptions by the plaintiffs.

G. F. Edmunds for the plaintiffs.

I. An open guaranty is binding until notice of its recall is actually given to the party who is acting under it.

Death does not revoke an agency, when that agency is coupled with an interest. If it be not necessary to do the act *in the name of the principal*, it may as well be done after his death as before. Story on Agency § 488, *et seq.*

Suppose a banker in New York issues a letter of credit to a person going abroad, and therein agrees to accept his bills, can it be said that a banker in St. Petersburg must first ascertain whether the signer of the letter is living, before he can advance money upon it? Such a rule would make an end of commerce between distant places; 12 Mass. 206, *Cutts v. Perkins*.

II. The taking of the notes mentioned in the case, "*as collateral*," did not amount to, or imply, any agreement to extend the time of payment; 2 L. C. in Eq., pt. 2, 385-6; 6 How. 279, *U. S. v. Hodge*; *Ripley v. Greenleaf*, 2 Vt. 129.

III. To the objection, that these bills do not come within the contract, on the ground that they were made payable in New York, we answer:

I. *There is no limitation in the contract itself*; it is a general au-

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thority to draw, and, under such an authority, it rests with the defendant to show that the place of payment was not usual in the course of business, and such as the parties could not have contemplated; 15 Conn. 475, *Bridgeport v. Housatonic R. Co.*

2. It is an inseperable incident to the right to draw, that the drawer (unless special provision is made) may appoint the place of payment; otherwise, he could not direct payment to be made at a bank, even in the place of the residence of the drawee; and in the present case, *the contract is silent as to the place upon which, or where, the bill should be drawn, or made payable*, and purposely so, no doubt, in order that the parties might draw upon the various markets in which their funds might be received in the course of their trade.

J. Maeck and Underwood & Hard for the defendant.

The case shows that Leavenworth was a mere *surety*, and therefore the only consideration for his liability, was the discount by the plaintiffs, and but \$ 5,000 of the notes in question are discounted in the life-time of Leavenworth. The law does not require notice of the death to be given, where there is no person who is bound to give it; and notice of the death is not necessary to terminate the authority to draw, or the guaranty; *Blades v. Free*, 17 E. C. L. 83; Coll. on Part. § 120 and note, § 538; *Caldwell v. Stilmar*, 1 Rawle, 217.

The authority to draw, and the promise to accept and pay, does not extend to any bill not drawn in pursuance of the contract.

As there is no evidence, the court must determine, from the contract alone, the extent of the liability.

The defendant living and doing business in Burlington, and executing the contract there, it is not to be inferred that he gave authority to draw drafts at sight, or on time, payable in New Orleans, St. Louis, Detroit or New York, but payable at his own place of business.

It is of great consequence to him, whether he should be at the expense to provide funds in all the commercial cities in the world to meet drafts that may be drawn on him, or be at the risk of paying large damages for exchange and re-exchange, if the drafts should be protested; *Lanusse v. Baker*, 4 Pet. 214.

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The case shows that after \$ 12,000 of the bills in question had matured, the plaintiff accepted other notes of Catlin, Wilkins, and J. & J. H. Peck & Co., on time, as collateral security, and retained the same, and have sued them, without other evidence, leaving the court to determine what the law will imply from this.

If the law implies a contract to wait until the result of the new security can be known, or until it matures, then Leavenworth, being a surety, is discharged. This disposes of the \$ 5,000; *Atkinson v. Brooks*, 26 Vt.; *Oakie v. Spencer*, 2 Am. Lead. Ca. 170 and notes.

The opinion of the court was delivered, at the circuit session in September, 1856, by

ISHAM, J. Independent of the question, whether these bills of exchange were drawn in pursuance of the letter of credit on which the estate of Mr. Leavenworth is now sought to be made chargeable, we are satisfied that, as to those bills which fell due previous to and on the 5th of August, 1854, the estate is discharged from all liability upon them, by the arrangement made on the 15th of August in that year. At that time Mr. Catlin executed four promissory notes amounting in all to the sum of \$ 12,000, payable in 30, 40, 50 and 60 days after date, which were endorsed by Mr. Wilkins and the firm of J. & J. H. Peck & Co., the latter of whom was not a party to the original bills, nor to the letter of credit. Those notes were received as collateral security for the payment of those bills which were then due and unpaid. The letter of credit, on the authority of which these bills were drawn, was signed by Mr. Leavenworth as surety for the other parties to that instrument. The fact that it was signed by him in that manner was known to the plaintiffs at the time the bills were received by them and discounted. The effect of that arrangement was to give further time for the payment of those bills to the persons primarily liable upon them, until the new securities had matured. It was a suspension of the right of the holder to sue the parties upon them, and an implied undertaking to wait for the payment of the original bills, until the notes fell due. The English authorities to that effect are very decisive, and such seems to be the general current of the American cases. In the case of *Gould v. Robson*, 8 East 576, it was

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held that the holder, by taking a renewed bill payable at a future time, though under an express agreement that the original bills should be retained in his hands as security, impliedly agreed to give time until the new security became due, and could not sue, in the *interim*, on the original bill; *Stedman v. Gooch*, 1 Esp. Cases 14; 2 Amer. Lead. Cas. 182. We are aware that a different rule was held in the case *Pring v. Clarkson*, 1 Barn. & Cress. 14, in which the court, after recognizing the general principle that time given to the acceptor of a bill will discharge the other parties, observed, that "in no case has it been said, that taking a collateral security "from the acceptor shall have that effect." That case, however, has not met with the approbation of elementary authors; Chitty on Bills, 444; Bailey on Bills, 341; and is considered as overruled in the exchequer by the case of *Kendrick v. Lamax*, 2 Cr. & Jer. 405. The case of *Okie v. Spencer*, 2 Wharton 253, is a well considered and leading case in this country on that subject. In that case, the holder of a note, on the day it fell due, accepted from the maker a check drawn by him and a third person who were partners, payable six days afterwards, which, if paid at maturity, was to be in full satisfaction of the note. The court held that the check was received as *collateral security*, that it *suspended the remedy* against the maker of the note during that period, and *was a discharge of the endorser*. The same doctrine was held in the case of *Myers v. Willis*, 5 Hill 463, where a surety was discharged when a note had been accepted, payable at a future day on account of a debt for which he was liable. The same principle was subsequently sustained in the case *Fellows v. Prentiss*, 3 Denio 512. In all cases of that character, so far as those primarily liable for the debt are concerned, the suspension of the remedy will cease when the security has matured, and ordinarily they may then be sued on the original indebtedness. But in relation to sureties, such a suspension will effect a complete bar to the original right of action; 2 Amer. Lead. Cas. 183, and cases cited. If Mr. Leavenworth had stood as an endorser of those bills, it would hardly be questioned, but that he would have been discharged by the acceptance of those notes. The effect is the same when they seek to render him liable on that letter of credit which he signed as surety, unless it affirmatively appears that the remedy against the principals, was reserved

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during that period; 2 Vt. 129. We think, therefore, the court were correct in disallowing those bills as subsisting claims against the estate of Mr. Leavenworth.

In relation to the remaining two bills of exchange, dated June 13th and 19th, amounting to the sum of \$8,000, a majority of the court consider that they were also properly disallowed, on the ground that they were drawn after the decease of Mr. Leavenworth, which occurred on the 10th of May previous. The objection taken to the allowance of these bills equally affects all the others, except the first, dated on the 8th of May, 1854. The decease of Mr. Leavenworth, it is considered, was a revocation of all authority to draw bills thereafter on the strength of that letter of credit; and in this respect, it is immaterial whether the plaintiffs had notice of his death at the time they received and discounted the bills, or not. The general principle is well settled, that an authority conferred by a letter of attorney must be executed during the life of the principal; for a power to represent another, can only continue as long as there is some one to be represented; Paley on Agency, 156; Bac Abg. Tit. Authority (d); Co. Litt. 52 (b.) In the case of *Hunt v Rausmanier*, 8 Wheat. 174, it was held, that a letter of attorney was revoked by the death of the party making it, though it may be irrevocable during his life; same case, 1 Peters 1. The same doctrine was held in *Galt v. Gallaway*, 4 Peters 344, in which the court observed that "no principle is better settled, than that the powers of an agent cease on the death of his principal. If an act of agency be done, subsequent to the decease of the principal, though his death be unknown to the agent, the act is void." The reason of that rule is, that upon the death of the principal his estate belongs to his heirs, devisees, or creditors; and their rights cannot be impaired by any act of one who was not their agent, and who has no control over their property; *Harper v. Little*, 2 Greenleaf, 14, 18. That rule, however, is subject to the qualification, *that if the authority is coupled with an interest*, it is not revoked by the death of the principal. In such case, it survives the person giving it, and may be executed after his death. That qualification is recognized by both English and American authorities; *Hunt v. Rausmanier*, 8 Wheat. 174; 1 Amer. Lead. Cases 567, and cases cited; *Walsh v. Whitcomb*, 2 Esp. Cas. 565; *Gausson v. Morton*, 10 Barn.

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& Cress. 731; *Smart v. Sanders*, 5 Man. Gran. & Scott 894, 916. I have had some hesitancy, however, in coming to the conclusion, that these bills should be disallowed for that reason. The decease of Mr. Leavenworth probably determined the authority of Roelofson, Hatch & Co. to draw bills on him so as to bind his estate for their acceptance and payment. But Roelofson, Hatch & Co. were also authorized to draw jointly and severally upon the other parties to that letter of credit, and for such bills as were drawn upon either or all of them during a given period, Mr. Leavenworth therein gave his written guaranty that the bills should be accepted and paid. While their authority to draw on Mr. Leavenworth was determined, it is difficult to perceive why they were not still authorized, during the period limited, to draw on Mr. Catlin, or either of the other persons who were living, and who signed that letter of credit. The decease of Mr. Leavenworth, it strikes me, could not determine the authority which they had given to draw on them individually; and, if the letter of credit authorized the drafts, it would seem to follow that the plaintiffs could rely on Mr. Leavenworth's guaranty, that they should be accepted and paid. In such case, it is not a question of agency, but of contract, and what will defeat its binding obligation. These bills, however, must be regarded as having been drawn without authority; the decease of Mr. Leavenworth having revoked the authority contained in that letter of credit. Under such circumstances, it was not necessary that notice of Mr. Leavenworth's decease, should have been given to Roelofson, Hatch & Co. in order to determine their authority under it. The revocation was effected by operation of law. In such case, the power of the agent ceases immediately, without any further act being done. But when the revocation is effected by the act of the party, such notice becomes necessary, *Galt v. Galloway*; 3 Kent's Com. 63, 67; Story on Part. 336, 7, 9. Partners bind each other by their contracts, on the principle that each is the agent of the others in their partnership transactions. That agency may be determined by operation of law, as by the death or bankruptcy of either. In such case, no notice is necessary to determine the agency of the survivors, as it is when it is determined by their voluntary act; 3 Merivale, 614; 3 Swanston 490; 16 John. 494; Bissett on Part. 102, 104.

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The objection which has been taken to the allowance of these bills of exchange, on the ground that Roelofson, Hatch & Co., were not authorized, by that letter of credit, to draw them, payable in the city of New York, is, I think, well taken. This objection affects not only the two last bills referred to, but it equally affects all the bills presented for allowance against the estate. There is no doubt as to the general principle which governs this subject. In 2 Amer. Lead. Cas. 213, 214, it is said that, "nothing is better settled than that a promise of acceptance must fail altogether, both as an executory contract, and as a virtual acceptance, whenever the bill to which it is sought to be made applicable falls without its limits in any material fact; and that the only safe guide is a scrupulous adherence to the letter of the contract;" and when the promise of the defendant is put in the form of a guaranty of future drafts, it will give no right of action unless minutely adhered to; *Dobbin v. Bradley*, 17 Wend. 422; *Birkhead v. Brown*, 5 Hill 634; *Walworth v. Thompson*, 6 Hill 540; *Murdock v. Mills*, 11 Met. 5.

The letter of credit, on the authority of which these bills were drawn, specifies no place at which the bills were to be made payable. They simply agreed to accept and pay such bills as should be drawn on them individually, or otherwise. If the bills were drawn on them jointly, it was a joint agreement to accept and pay them; if they were drawn on either one of them, it was a joint and several engagement, that they should be accepted and paid as they were drawn. It is unnecessary, in this case, to say whether the parties to that instrument were bound to accept and pay bills of exchange drawn payable at the Michigan State Bank, or whether they should be made payable at the place where the drawees resided and had their place of business. Roelofson, Hatch & Co. were authorized to draw through that bank, and probably the parties contemplated that the money was there to be advanced upon them. In the case of *Lanuse v. Barker*, 3 Wheat. 101, Johnson J. observed, "where a general authority is given to draw bills from a certain place, on account of advances there made, the undertaking is to replace the money at that place." But, on the other hand, it is clear that, if the bills themselves had been drawn, like the letter of credit, without specifying any place of payment, they

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would have been payable at Burlington, in this state, where all the parties who signed that letter of credit resided; Chitty on Bills, 172; *Mitchell v. Baring*, 10 B. & Cress. 4. But however that may be, it is sufficient in this case to observe that the drawees were not bound by the terms of that contract to accept bills payable in the city of New York. If Roelofson, Hatch & Co. had authority to draw bills payable in that manner, they had equal authority to designate Baltimore or New Orleans as the place of payment. That is not the legal effect of the contract of acceptance, or letter of credit. If these bills had been drawn on Mr. Leavenworth and presented to him for acceptance during his life, he might have refused his acceptance without any violation of his contract. In the language of Bronson, J. in *Birchard v. Brown*, 5 Hill 642, he might have said; "That is not my contract, and so long as he can give this answer truly, he cannot be charged with the debt of his principal." The acceptance of those bills would have imposed on him the performance of a duty, and a risk in the transmission of funds, and a liability to damages in case they were protested, which by his agreement he had not assumed. The case of *Lanuse v. Baker* is an authority on this question. In that case the defendant, who resided in New York, guaranteed the payment of such bills as should be drawn on Tabor & Son, Portland, or himself, at sixty days sight. The bills were drawn on Tabor & Son, Portland, payable in New York. Justice Johnson observed; "we are of opinion that these bills were not drawn in conformity to the assumption of the defendant. Merchants well understand the difference between drawing bills upon a specified place, and drawing them upon one place payable in another. We are not to inquire into the reasons which govern them in forming such contracts." The place where Tabor & Son resided, was named in that letter of credit and guaranty, but the place where the bills were to be made payable was not specified; and if making those bills payable in New York, was unauthorized, it was equally without authority that these bills were so drawn. In the case of *Ulster County Bank v. McFarlan*, 5 Hill 482, it was held that a bill at ninety days after date, was not authorized by a letter of credit giving authority to draw at ninety days. The legal effect of the letter of credit was an authority to draw at ninety days sight, and as the bill created a

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different obligation, the party was not liable for its payment. In that case, as in this, the legal effect of the letter of credit was different from that created by the bill. In the case of *Dobbin v. Bradley*, 17 Wend. 425, it was held that a party who was liable as surety or guarantor for the payment of the paper of another, when payable at a particular bank, is not liable when no place of payment is specified, though the paper was deposited in that bank, and notice given to the surety. The legal effect of a note payable at a particular place, is different from one where no place is specified, and for that reason the surety was not liable for its payment. Bronson, J. observed that "it was immaterial whether the qualification which the party placed upon his liability was reasonable "or unreasonable, or whether it was beneficial to him or not. He "has a right to judge of that matter for himself. The cases," he observed, "speak a uniform language on the subject."

The acceptance of these bills by Catlin would probably be considered a waiver of this objection, so far as *these bills* and *he personally* are concerned. It would not be competent for him to raise that objection after having, by his acceptance, promised to pay them. But that acceptance can have no such effect against the estate of Leavenworth, as he was not a party to those bills, nor is the estate bound by any act of those persons who signed the contract of acceptance with him, to which no assent on their part has been given. The fact that, upon the authority of the same letter of credit, bills had been previously drawn, payable in New York, which were accepted by Catlin, and paid at maturity, will have no effect to render *even him liable upon bills subsequently drawn in that manner*, whenever on that account he sees fit to refuse acceptance; much less will it have the effect to charge other persons who stand as sureties. The express provisions of that contract cannot, nor can its legal effect be changed or altered by such considerations. The contract is specific in its provisions, and in making the bills payable in New York, it is clearly at variance with its legal effect. Where there is no ambiguity in the language of the contract, the law settles its construction, and defines its legal effect. In such cases, the contract is not open to evidence of extrinsic circumstances for explanation, nor can its legal effect be changed by any practical construction of the parties. This very

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point, as applied to letters of credit, under the authority of which bills of exchange had been drawn, was determined in the case of *Ulster County Bank v. McFarlan*, 5 Hill 436. In that case, McFarlan had accepted bills at *ninety days after date*, when he was bound, by the legal effect of his letter, to accept only bills at *ninety days sight*. Justice BRONSON observed, "it would be giving a new application to the doctrine of estoppel *in pais*, to hold that it may govern the construction, or control the legal effect of a written instrument. He might accept bills, whether they were in conformity to the authority or not, or although they might have been without the shadow of an authority. *The actual acceptance of the bill produced did not furnish any evidence that he deemed it such a bill as he was bound, by the letter of credit, to pay.*" In a note to that case it is also observed that even an admission of the party, that the bill was drawn within the letter of credit, "would only go to the construction or legal effect of the letter, and therefore ought not to operate." The same doctrine was recognised in *Mendock v. Mills*, 11 Met. 14. In that case, bills were drawn, under the authority of a letter of credit, which the defendant agreed to accept when accompanied by a bill of lading and an order of insurance. Several bills had been accepted when no such bills of lading or orders of insurance had been forwarded. HUBBARD, J., observed that, "the instructions were limited and express, and though they accepted most of the bills, on the belief that consignments would cover them, *yet such acts laid them under no obligation to accept other bills not drawn agreeable to the directions given.*" See, also, *Parsons v. Armor*, 3 Peters 430. Leavenworth bound himself to accept and pay such bills only as were drawn in conformity with the letter of credit, and his estate is liable for any breach of that contract. But it is not competent for those who stood in that contract as principals, by any declaration or by any course of dealing, to vary the terms or legal effect of that letter of credit. But, if it could be done, so far as to bind the principals in that contract, that fact of itself would discharge Leavenworth, or any other person who stood upon that contract in the relation of surety.

We are all agreed that the judgment of the county court must be affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT.
FOR THE
COUNTY OF FRANKLIN.

AT THE
JANUARY TERM, 1856;
AND AT THE
CIRCUIT SESSION, IN SEPTEMBER, 1856.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

ALANSON M. CLARK v. JAMES M. TABOR.

Practice. Possessory title.

A party is entitled to a charge as to the legal result of such a state of facts as he claims exists, and his testimony tends to prove.

The recognition, by the proprietors of adjoining lots, of a particular line as their division line, and their acquiescence in it for a period of fifteen years, will establish it and make it thereafter binding, if, during that time, either proprietor had a continued, though it was only a constructive possession of his lot.

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If adjoining proprietors recognize a particular line as their division line, but, by agreement, build their division fence where it is most convenient, without endeavoring to place it on the line, a part of it being on one side and a part on the other, and agree that when the land is cleared up the fence shall be put upon the line, a mere occupation, by either proprietor, to such fence for a period of fifteen years would not establish the irregular line upon which the fence was built;—but would establish the line indicated by the general direction of the fence which the parties recognized and had in mind at the time the fence was built.

EJECTMENT to recover a piece of land claimed as a part of lot No. 2, on Hog Island. Plea, the general issue; trial by jury, April Term, 1851,—PIERPOINT, J., presiding.

It was admitted, on trial, that the plaintiff was the owner of lot No. 2, and the defendant of lot No. 3, on Hog Island, in the town of Swanton.

The plaintiff introduced evidence tending to prove that the defendant, at the commencement of the suit, was in possession of part of lot No. 2, as originally surveyed, being the land described in the declaration.

The defendant introduced evidence tending to prove that the line between lots Nos. 2 and 3 had been reputed and considered to be a line drawn from the south-west corner of lot No. 3 to the south-east corner of the governor's lot, and claimed that such line was the true division line, which would include within the bounds of No. 3 the land described in the declaration. The defendant also introduced evidence tending to prove that in 1832, one Sands Helms, under whom the defendant claims, purchased lot No. 3; that he was then shown the boundaries of his lot, by his grantor, who stated to him that the north-west corner of lot No. 3 was the south-east corner of the governor's lot; that when Helms purchased No. 3 there was not any fence between Nos. 2 and 3, except about twenty rods of log fence, running northerly from the south-west corner of No. 3, (which corner was admitted by both parties to be the true corner;) that Helms, after he took possession of No. 3, and one Otis, who then occupied No. 2, under Thomas Clark, the plaintiff's grantor, agreed to build a division fence between the lots; and, that Otis then showed Helms a line running north from the log fence, terminating at a marked tree, which Otis said was the south-east corner of the governor's lot; that it was then agreed by Helms and Otis that they would build the fence where it was most convenient, without regard to placing

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it on the line, and, when the land was cleared, the fence should be put upon the true line. The fence was built, part on one side and part on the other side of the line, and was kept up until a short time before the commencement of the suit, when the defendant built a new fence, placing it on the line as he claims it. The defendant also introduced evidence tending to prove that before Helms' purchase, one Otis and Casey Clark, when Otis owned No. 2 and Clark No. 3, recognized the north-west corner of No. 3 as the south-east corner of the governor's lot, and the line between lots 2 and 3 as the defendant claimed it.

Evidence was introduced tending to prove that the log fence was built upon the line claimed by the plaintiff, and as originally surveyed, and that the line shown Helms was a straight line, and that the corner shown Helms by Otis, as the south-east corner of the governor's lot, was not as far north by several rods as the corner of the governor's lot as now claimed by the defendant.

The defendant requested the court to charge the jury that, if the proprietors of lots Nos. 2 and 3 had recognized a line as the division line between the lots, and had acquiesced in such line for more than fifteen years, it would establish such line as the boundary of each lot, and that the plaintiff was not entitled to recover for any land east of said line. The court did not so charge, but instructed the jury that the admission, by the owner of lot No. 2, of a wrong boundary, would not affect his title to the land; nor would the recognition by the owners of the two lots of a wrong line, or their acquiescence therein, be conclusive as to their title, unless accompanied by a continued possession in one or both for fifteen years; and if, at the time of the erection of the fence in 1832, by Helms and Otis, it was then agreed by them that the fence should be built where it was most convenient, (not intending to place it on the line,) and that when the land was cleared the fence should be put upon the true line, that Helms or his grantees could not acquire any right by the statute of limitations in consequence of occupying the land up to the fence, until he made some claim to the land consistent with such agreement. To this charge and neglect to charge as requested, the defendant excepted. Verdict for the plaintiff.

H. G. Edson and W. W. White for the defendant.

A. O. Aldis for the plaintiff.

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The opinion of the court was delivered by

REDFIELD, CH. J. The controversy in the present case is one very common and very perplexing, and one of very uncertain issue before a jury,—and one that ought not, for these reasons among many, to be revived, except upon the most satisfactory grounds.

The first inquiry upon the exceptions is, whether the case was properly tried in the court below. We must first inquire what was the state of the evidence, upon the former trial, as detailed in the bill of exceptions. And, while we always feel justified in giving the statement of the case every reasonable construction in favor of the judgment below, we have never felt justified in putting such a construction upon the case as will make one portion inconsistent with others, or any of the doings of the court below inconsistent or unreasonable, when any other probable view will allow us to escape from such results. The important facts seem to be, that Sands Helms bought the lot No. 3, in 1832, and, after he took possession, he and Otis, who had been in possession of No. 2 before that time, under Thomas Clark, (who deeded to A. M. Clark,) agreed, or had some understanding as to the dividing line; and Otis, as tenant of Clark, who owned No. 2 as early as 1832, in the language of the exceptions, “showed Helms a line running north from the log fence, terminating at a marked tree, which Otis said was the south-east corner of the governor’s lot.” Now, it is said in argument, this was the very line claimed by the plaintiff. But it is obvious, the defendant claimed, upon the trial, that this testimony showed a line as the boundary of the two lots, recognized by the occupants as the true dividing line between them, which corresponded with what the defendant now claims as the boundary, established by acquiescence from that time to near the commencement of the action; and the court must have taken that view of it, else why submit it to the jury at all, if it had reference to the line claimed by the plaintiffs. In this view of the testimony there was nothing to submit to the jury, and the county court are made to act a very singular part in submitting it to the jury, under a charge, if it had not reference to some line different from the one now claimed by the plaintiff. We feel bound to say that, as we understand the case, this line showed by Otis to Sands Helms, and which the

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occupants of both lots then claimed as the true division line between the lots, was supposed, by some of the defendant's witnesses certainly, to be the line which the defendant now claims, or the judge would not have stated it as he does, or have treated it as he did. If so, then the building of an irregular fence upon both sides of this line, and agreeing that when the land was cleared it should be built "upon the true line," must mean the line which the proprietors, or occupants of the adjoining lots then regarded, and which was indicated by the general direction of the fence, as the true line. This, then, was a distinct recognition of this, by the several occupants, as the true dividing line between the lots, and, if continued for fifteen years, would establish it as the division line. The defendant was then entitled to a charge with reference to what his testimony tended to prove, and what the court regarded it as tending to prove. It is to be remembered that, from 1832, and it would seem for many years before, both these lots were occupied; for the owners of lots not occupied are not to be supposed, ordinarily, to divide them by fences, and the log fence was in existence before this. And if we could suppose the proprietors of land to fence it before it was cleared, that of itself would be, undoubtedly, such an act of possession; or, if the fence were kept up fifteen years, that would establish the line; but there seems no doubt these lots, from the statement, were occupied before 1832. But, after that time, the term of fifteen years expired before this suit was brought.

What kind of charge, then, was the defendant entitled to demand? The same, undoubtedly, which would be the legal result, if the jury believed his evidence. And this, as it seems to us, was just what he asked the court to tell the jury, "that if the proprietors of lots, Nos. 2 and 3, had recognized a line as the division line between the lots, and had acquiesced in such line for more than fifteen years, it would establish such line as the boundary of each lot." This, of course, must be understood with reference to the facts in the case, that the parties had been in constructive possession of the lots during this whole time, and in regard to this there was no controversy, as we understand the case.

What application then did the charge given have to the case?

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“That the admission by the owner of lot No. 2, of a wrong boundary, would not affect his title to the land; nor would the recognition by the owners of the two lots, of a wrong line, or their acquiescence therein, be conclusive as to their title, *unless accompanied by a continued possession, in one or both, for fifteen years.*” This is all very true, in the abstract, probably, but we cannot see what application it has to a case where there is a possession of both lots.

And it seems to us that it was directly calculated to mislead the jury. They must infer that the judge supposed it had some application to some question of possession; and, as there could be no other one, they would very naturally understand it had reference to actual possession upon one side or the other, up to the disputed line, and it seems to us the judge must have taken the same view, or else he could not have put the case upon any such ground. But this has never been required anywhere. If there is but a constructive possession of one of the lots, and certainly if so of both, it is always held sufficient to render the acquiescence in a division line binding.

And the portion of the charge in regard to the agreement when the fence was built, by no means gives the proper effect to that transaction, and the testimony in regard to it. The testimony was that the fence was built upon both sides of a line which the parties, or the occupants of the two lots, at that time regarded as the dividing line of the two lots. The testimony then was much the same as that in *Ackley v. Buck*, 18 Vt., 395 and in some other cases reported, and such as occurs at the circuit in many counties almost every term, and it was never doubted that this was very significant and important evidence to show the recognition and acquiescence in such line as the parties understood was the true line, and as indicated by the general direction of the fence, and, as was claimed in the present case, on the part of the defendant, extended to the south-east corner of the governor's lot. And we think the defendant was entitled to have the jury instructed in regard to the effect of this testimony correctly, if any instructions were given. The other portion of the charge, as to the conclusiveness of the line marked by the fence strictly, was correct enough. It could not, of course, establish the irregular line marked by it, while such a con-

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tract remained in force. But it would establish the line which the fence was intended to indicate by its general course, and which the parties had in mind as the true line, and not necessarily the original surveyed line.

Judgment reversed and case remanded.

ELIJAH D. NICHOLS AND OTHERS v. MARIA NICHOLS AND OTHERS.

Petition for partition. Delivery of deed. Fraud. Review.

A petition for partition cannot be maintained by one whose only title is under a deed by which the grantor, who is still living, reserves to himself the use and occupation of the premises during his life.

It may be shown, for the purpose of preventing the operation and effect of a deed, in the hands of the grantee named in it, that it never was lawfully delivered to him, but that it was delivered as an escrow to a third person, and that he wrongfully and without authority delivered it to the grantee.

A petition for partition is not a civil cause within the meaning of the statute allowing reviews. Comp. Stat. ch. 23 § 17, (but repealed by No. 51 of the law of 1855.)

PETITION FOR PARTITION of a certain farm in Fletcher. Plea, that the petitioners were not the owners of the undivided half of said farm claimed by them, but that the same belonged to Dewey Nichols; trial by jury, June Term, 1854,—POLAND, J., presiding.

The petitioners read in evidence, 1st, a deed from Dewey Nichols to the petitioners, dated September 14, 1850, of one equal undivided half of the farm in question, reserving the use and occupation thereof during his own life, and the lives of his wife, and his daughter Betsy; 2d, a copy of a deed from Dewey Nichols to the petitioners, dated March 16, 1853, of the same premises covered by the last deed, but without any reservation; 3d, a copy of a deed from Dewey Nichols to the defendants of one undivided half of the same farm, dated September 14, 1850. It was admitted

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that the said Dewey Nichols and his daughter Betsy were living. The defendants then offered to prove that the deed from Nichols to the petitioners, dated March 16, 1853, was never legally delivered to the petitioners, but that it was executed by the said Dewey, and delivered to a third person, as an escrow, and that it was wrongfully delivered by said third person to the petitioners, without lawful authority from said Dewey Nichols, and by them procured to be recorded. The petitioners objected to this evidence, but it was admitted by the court, to which the petitioners excepted. The court charged the jury, that the deed from Dewey Nichols to the petitioners, of September 14, 1850, did not convey to them such a title as would enable them to sustain a petition for partition, in the life time of Dewey Nichols, and to this charge the petitioners excepted. The jury returned a verdict in favor of the defendants, and, after judgment thereon, the petitioners moved for a review, which motion was overruled, and a review denied, to which ruling the petitioners also excepted.

H. G. Edson for the petitioners.

The petitioners, by virtue of the deed dated September 14, 1850, were holding real estate with the petitionees, as tenants in common, in the sense in which the word holding is used in the statute relating to the partition of real estate.

If this deed showed any title in the petitioners, it would support the issue on their part.

The evidence in relation to the deed from Dewey Nichols to the petitioners, dated March 16, 1853, was improperly admitted. This evidence is only admissible as between the immediate parties to the deed, and those interested or affected by it. The deed did not cover any portion of the premises conveyed previously to them, and they were not parties to this deed, and the deed did not affect their title; neither would the partition affect their title or interest.

The court erred in overruling the motion for a review. By chap. 28th of the Compiled Statutes, either party, in any civil cause, originally brought to and tried in the county court, may once review his cause. This petition was brought originally in the county court, and is a civil cause within the meaning of the statute.

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The legislature must be supposed to have made a legal and popular use of the word cause, which is defined to be "a suit or action in court: any legal process which a party institutes to obtain his demand, or by which he seeks his right or supposed right."

A. O. Aldis and *H. R. Beardsley* for the defendants.

The petitioners have no possession, or right of possession, till after the death of Déwey Nichols; and the petitioners and the defendants are not strictly tenants in common, there being no unity of possession.

Under our statute, they must be tenants in common to sustain their petition. To sustain a bill for partition the party must be in possession, or have the right of immediate possession. *Brownell v. Brownell*, 19 Wend. 365, and such was the old English law; 4 Kent 364.

A reversioner cannot sustain a bill for partition, except where, as in some states, they are specially authorized by statute; 12 Pick. 374.

A petition for partition, is not a civil cause in which a review is allowed. It is, from its mode of trial, and from the nature of the relief sought, like account, book account and petitions in regard to highways, &c. &c., a peculiar statute remedy, not intended to be open to review.

The opinion of the court was delivered by

ISHAM, J. This is a petition for partition. The Comp. Stat. 300, § 1-2, provides, that "any person having or holding real estate with others, as joint tenants, tenants in common, or coparceners, may have partition thereof, in the manner therein provided." The petitioners are required to state in their petition, the title by which they hold the land, the names of the several owners, as far as known, and give a particular description of the premises. The title of the petitioners may be denied by plea, and an issue may be formed, so that the matter in controversy may be tried as in civil suits. In this case, the title of the petitioners to the land, as tenants in common, was denied by the plea. It became necessary, therefore, on the trial of the case before the jury, for the plaintiffs to establish their relation as tenants in common in order to entitle themselves to a partition of the premises.

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It appears, from the case, that on the 14th of September, 1850, Dewey Nichols conveyed to the petitioners, an undivided half of the farm, of which the premises in question are parcel; and that the other undivided half was, by a separate conveyance, conveyed to the petitionees. But, in the conveyance of the undivided moiety to the petitioners, Dewey Nichols reserved to himself the use and occupancy of that portion of the farm during his own life, and that of his wife and daughter; and it appears that Dewey Nichols and his daughter are still living. The effect of those several conveyances was to vest in the petitionees a title in fee, as tenants in common to one half of the farm, with the right of its present and immediate possession; and to give to Dewey Nichols a life estate in the other half, with the right of possession during the lives of the persons for whose benefit that reservation was made. As between Dewey Nichols and the petitionees, a partition could probably be had. In 2 Lilly's Abg. 357, H., it is said, that "partition may be brought by tenant in fee of one moiety, against tenant for life of the other moiety;" Lutw 1018. Those parties have not a unity of title, but they have a unity of possession, and, therefore, are strictly tenants in common. The petitioners, under their deed, have no right to the possession, use or occupancy of the moiety conveyed to them, until after the determination of the particular estate which the grantor reserved to himself. They have neither the possession, nor the right of possession to any portion of the premises, during the life of either of the persons for whose benefit that reservation was made. Under these circumstances, we think that the charge of the court to the jury was correct, "that the deed of Dewey Nichols to the petitioners, of September 14, 1850, did not convey to them such a title, as would enable them to sustain a petition for partition, during the lifetime of Dewey Nichols." During the life of Dewey Nichols, the petitioners cannot be regarded as having a present estate, as tenants in common with the petitionees. There is no unity of possession between them, nor can there be, so long as the petitioners have no right of possession. That relation may exist on the decease of Dewey Nichols, and those for whom that reservation was made, but not until then.

It may not be necessary, in all cases, that a party have the actual occupation of the premises to entitle him to a partition, for

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where the possession is not adverse, a constructive possession follows the legal title; *Hawley v. Soper*, 18 Vt. 320. But the petitioners must show a legal title to the land, as tenants in common with the petitionees, and the right of immediate possession at the time of presenting the petition; so that actual occupancy of the premises in severalty, can be had by the tenants, immediately on partition being made. In 4 Kent's Com. 380—note, it is said, that "it was the ancient doctrine, under the statutes of Henry VIII, "that no persons could be made parties to a writ of partition, or "be affected by it, but such as were entitled to the present possession of their share in severalty." In the case of *Burhans v. Burhans*, 2 Barb. ch. 398, it was held that "a party applying for a "partition of lands, must not only have a present estate in the "premises, as a joint tenant, or tenant in common, but he must "have also the actual or constructive possession of his undivided "share or interest in the premises." In *Brownell v. Brownell*, 19 Wend. 367, it was held that "proceedings in partition, under the "statute, can be instituted only by a party who has an estate "entitling him to immediate possession." The same rule was recognized in New Jersey, in *Stevens v. Enders*, 1 Green 271, and in Connecticut, in the case of *Culver v. Culver*, 2 Root 278, where a widow was seized of a life estate, with a remainder to those persons who were parties to the proceeding, for partition. The court observed, that "it will be time enough for them to have partition "of the lands, when they shall have the possession and title." In *Packard v. Packard*, 16 Pick. 191, the same rule was recognized, that a petition for partition could not be sustained when the parties had only a reversionary interest, and not a vested estate in possession. *Barnard v. Pope*, 14 Mass. 434. *Hodgkinson et al*, 12 Pick. 374. The same doctrine is held in Pennsylvania, *Zeigler v. Grim*, 6 Watts 106, and in the case of *Brown v. Brown*, 8 N. H. 93, where it was held that "a petition for partition cannot be maintained by one who has only an interest in a reversion or remainder, after a life estate." The reason upon which that doctrine is founded is obvious. In 2 Lilly's Abg. 356, E., the rule is given, that "a partition of lands ought to be made according to the quality "and the true value of the lands, and not according to the quantity "or number of acres." If a just and equitable partition of these

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premises were now to be made, that partition may be unjust and unequal, when, upon the decease of Dewey Nichols, these parties have a vested estate in possession. For that reason, we think, this petition cannot now be sustained.

The evidence offered in relation to the deed of March 16, 1853, was, manifestly, properly received. That deed, without that evidence, would have given to the petitioners a present estate in fee, as tenants in common with the petitionees. The effect of the evidence offered, was to defeat the title of the petitioners under it. The title of the petitioners to this land, was then left to stand on the deed of Dewey Nichols, of September 14, 1850, which we have considered as not giving to the petitioners that title and right of possession, which entitles them to a partition of these premises.

We are satisfied, also, that the court were correct in deciding that, under our statute, this case could not be reviewed. The right of review, with few exceptions, is given by statute in all civil causes. The words "civil causes" have reference only to those suits or actions, which are commenced and prosecuted according to the course of the common law. That was obviously the meaning of the court in the case of *Borden v. Brown*, 7 Mass. 93, in which they observed, that "reviews are provided for only when the original action is commenced by writ." In that case a review was denied on a petition for partition of lands. At common law, no proceedings could be had to compel a partition, as between joint tenants, or tenants in common, for those estates were created by the act of the parties. The statute authorizes this proceeding, and directs the mode of procedure in making partition. The same reasons for not allowing a review in actions on book, in the action of account, or declarations for betterments, and various other cases of similar character, exist in this case. It is a statutory proceeding, and not a civil cause prosecuted according to the course of common law.

The result is that the judgment of the county court must be affirmed.

Royce v. Allen.

JOHN S. ROYCE v. WILLIAM ALLEN.

Agent.

If, in a simple contract made by an agent, the agent does not disclose his agency and name his principal, or, if he exceed his authority, he will render himself personally responsible.

BOOK ACCOUNT. The plaintiff's account was for his services in a suit brought by Theodora Allen, the mother of the defendant, against Dolphus Paul, to recover for property attached by him, as the property of Henry Allen, a brother of the defendant.

The auditor reported the following facts. Theodora Allen appointed the defendant her agent to consult with Homer E. Royce in reference to the propriety of commencing a suit for her for the property attached by said Paul; and, in case he, said Homer E. Royce, should be of opinion that an action could be maintained, to commence a suit therefor; but she *did not, at any time, give to the defendant any direction or authority to employ any other counsel on her behalf.* A suit was commenced against Paul, by the defendant, as agent for his mother, and in her name, and for her sole benefit; which suit was made returnable before a justice of the peace. In pursuance of the directions given by his mother, the defendant retained Homer E. Royce as counsel for her, and he acted for her in that capacity during the pendency of the suit, which duly passed into the county court, and was there discontinued; and he charged his fees to Theodora Allen. A short time previous to the commencement of the said suit, the defendant, while acting as agent for his mother, agreed with one Harvey D. Farrar, her son-in-law, to retain the plaintiff as counsel in the case; but it was not the expectation of said Allen or Farrar that either was to be personally responsible therefor.

Immediately after this, the said Farrar saw the plaintiff and informed him that the defendant wished to retain him in the suit, *Theodora Allen v. Paul*, but did not inform him for whose benefit the suit was to be prosecuted, though said Farrar knew that Theodora Allen was alone interested in it.

The plaintiff, in pursuance of this retainer, acted as counsel in the case, as well before the justice as in the county court, and from time to time *charged his services to the defendant, whom he believed*

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to be his employer and responsible to him for the service, and who took charge of the suit, as agent for his mother, and who at sundry times consulted with the plaintiff in reference to the prosecution of the suit. At the time the plaintiff was employed, the defendant did not intend to become personally responsible on account of such employment, nor did he, at any time during the pendency of said suit, inform the present plaintiff of the capacity in which he acted, nor who was to pay the expenses of the suit, nor for whose benefit the same was prosecuted; nor was the plaintiff informed thereof by any one prior to the commencement of this suit; nor did he make any inquiry in reference thereto. Soon after the plaintiff was retained, Theodora Allen was informed thereof by the defendant, and she expressed herself dissatisfied, but gave no express direction whether the plaintiff should be continued as counsel or not. Both the defendant and Theodora Allen were responsible for a much larger sum than the amount of the plaintiff's account, respecting the reasonableness of which no question was made.

Upon the report of the auditor, the county court, December Term, 1854,—PECK, J., presiding,—rendered judgment in favor of the plaintiff for the amount of his account. Exceptions by the defendant.

J. Rand for the defendant.

J. S. Royce for the plaintiff.

The opinion of the court was delivered by

ISHAM, J. It appears from the report of the auditor, that the defendant was acting as the agent of Mrs. Allen, in the preparation and prosecution of the suit against Dolphus Paul. The plaintiff was employed by the defendant, as counsel in that case, and for his services in that capacity the charges were made for which this suit is brought. It is distinctly stated that the charges were originally made against the defendant, whom the plaintiff believed to be his employer, and responsible to him for the amount, and that, at no time during the pendency of the suit, did the defendant inform the plaintiff that he was retained by him, as agent for Mrs. Allen; nor was the plaintiff in fact informed by any one, previous to the commencement of this suit, for whose benefit that suit was

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prosecuted, or who was to pay the expenses of it. Under these circumstances, it is clear that the defendant is responsible to the plaintiff for his account. The law upon this subject is well established, that, in simple contracts, if the agent does not disclose his agency, and name his principal, he binds himself, and is subject to all liabilities, express and implied, created by the contract, in the same manner as if he were the principal in interest. 1 Am. Lead. Cas. 609, note; Chitty on Cont. 226. The fact that the defendant did not intend to assume a personal liability, can make no difference in the principle which governs the case. If the agency of the defendant, and the name of his principal had been disclosed at the time the plaintiff was retained, and it was sought to charge the agent with a personal liability on the contract, it would then become a matter of intention, and the agent would not be liable, unless such was the intention of both parties. *Smith v. Watson*, 14 Vt. 332. The case under consideration falls within the application of this principle. The services were rendered on the credit and responsibility of the defendant. His agency was not disclosed, nor was the name of the principal, at any time before the commencement of this suit.

It is also stated in the case that Mrs. Allen did not, at any time, give to the defendant any direction or authority to employ the plaintiff on her behalf, and when she was afterwards informed of that fact, she expressed her dissatisfaction that the plaintiff had been employed. If the defendant exceeded his authority in retaining the plaintiff, he thereby rendered himself personally liable for the defendant's account. This is a general principle, and on simple contracts we are not aware of any exceptions to the rule. 1 Amer. Lead. Cas. 609. *Meach v. Smith*, 7 Wend. 315; *Futer v. Heath*, 11 Wend. 478; *Roberts v. Button et al.*, 14 Vt. 195. On both of these grounds, therefore, we think the defendant is liable for this account.

The judgment of the county court is affirmed.

Conner v. Carpenter.

DANIEL CONNER v. EDWARD CARPENTER.

Avoiding written contracts by parol testimony. Mortgage of personal property.

Where there is a written contract, it cannot be shown by oral testimony that, at the time of its execution, it was agreed and understood that the writing was a sham, and designed only to deceive the creditors of one of the parties; or that the real agreement between the parties was different from that expressed in the writing.

Distinctions between a mortgage and a pledge of personal property. Application of these distinctions, and construction of the contract, between the parties in the present case.

TROVER for a horse. Plea, the general issue; trial by jury, June Term, 1855,—PECK, J., presiding.

The plaintiff bargained with Jesse M. Scofield, for a span of mares, and applied to the defendant to sign a note with, and as surety for him, to the said Scofield, in payment therefor, and it was finally agreed that the defendant should himself purchase the mares of Scofield, and give his note therefor, and that the plaintiff should transfer to Scofield the horse in question, which the plaintiff then owned, and that it should be included in the sale from Scofield to the defendant, and that both the horse and the mares should be held by the defendant, as security for the payment by the plaintiff, to Scofield, of the notes given by the defendant, for the mares. The several transfers were made as agreed, and thereupon the horse and mares were delivered by the defendant to the plaintiff, and, at the same time, the plaintiff gave to the defendant a writing, as follows.

"Know all men by these presents that I have this day hired to Daniel Conner three horses: one four year old gelding horse, dark chestnut, switch tail, two white hind feet; and one span of six year old mares, formerly owned by J. M. Scofield. Said Conner has possession of said horses, so long as I, Edwin Carpenter, shall see fit, and no longer; and that I hold possession of said horses, and that said Conner shall not have a right to let, sell or hire, or make over to any other person or persons, the above mentioned horses, and further, the said Conner agrees to pay the sum of ten dollars per month for said horses."

(Signed)

"DANIEL CONNER."

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Some time after this, and before the commencement of this suit, the notes given by the defendant to Scofield being then and still unpaid, the defendant took the horse in question from the possession of the plaintiff, without his consent, and detained him. Upon the trial, after proof of the above mentioned facts, the plaintiff offered to show, by parol testimony, that by a verbal agreement between him and the defendant, made at the same time the written agreement was executed and delivered, that the writing was agreed and understood to be a sham, and to be only to keep off the creditors of the plaintiff, from attaching the property; and that the parol agreement made between them was, that the plaintiff was to have the use and possession of the horse, and the ownership and control of it; and that the paper was not intended to express the real contract; that by the verbal agreement, the transaction was a mere pledge of the horse, as security to the defendant for signing the notes, and that in the mean time, while the notes were outstanding, the plaintiff was to have the possession of said horse, and the right to use, and control, and dispose of the same, insisting that the writing was not conclusive, and that it was not binding, not being signed by the defendant.

This parol evidence being objected to by the counsel for the defendant, the court decided that, notwithstanding the written agreement, it was competent to show by parol, the consideration of the written contract, and that the purchase of the property from Scofield, and the turning out or transfer of the horse in question, was intended for the benefit of the plaintiff, and as a security merely to the defendant, for signing the note, and that the plaintiff was to have the whole property on paying the notes, or indemnifying the defendant therefrom; and that the plaintiff had paid or indemnified the defendant from said notes, so as to entitle him to the possession of the horse; but that it was not competent to show any agreement by parol, made at the same time the writing was, varying the stipulations therein, as to the right of possession or control of the horse, while the notes remained unpaid by the plaintiff; and excluded the evidence (as offered) on this point.

The court decided that upon the written agreement, and the above facts, which were testified to by the plaintiff's witnesses, the defendant had a right to the possession of the horse, at the time of

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the taking complained of, and directed a verdict for the defendant. Exceptions by the plaintiffs.

H. E. Royce and *A. O. Aldis* for the plaintiff.

The horse sued for was merely agreed to be pledged to the defendant. Without actual delivery, such agreement was inoperative. The possession and delivery from Scofield was not such a delivery as made a valid pledge between the parties.

As to the written contract, as it was intended by the parties merely as a sham, not intended to express the real contract; it was no contract between the parties. The claiming of it by the defendant, as a contract, was a fraud. It was not signed by the defendant, because it was not intended to be binding. The court therefore erred in assuming that it was a contract, and conferred a right of possession of the horse upon the defendant. It was for the jury to say whether it was or was not a contract.

J. Rand for the defendant.

The offer of the plaintiff to prove, by parol, that the real agreement was different from that expressed in the writing, and that the writing was not intended to express the contract, presented simply this question; can parol evidence be admitted to contradict, vary, control, or add to the written contract. The whole current of authority is against the proposition. *Linsley v. Lovely*, 26 Vt. 123. *Bradley v. Beniley*, 8 Vt. 243. *Bradley v. Anderson*, 5 Vt. 152.

The plaintiff cannot claim that the contract between him and the defendant was more favorable to him than to call it a mortgage of the horse, and other property, upon condition that the plaintiff should pay the notes to Scofield. *Holmes et al. v. Cram*, 2 Pick. 607. *Brown v. Bennett et al.*, 8 Johns. 96.

The plaintiff cannot set up fraud as to his creditors to avoid the contract. *Gifford v. Ford*, 5 Vt. 532, and cases there cited.

The opinion of the court was delivered by

REDFIELD, CH. J. We have examined this bill of exceptions with some care, and, it seems to us, the case was correctly decided by the county court.

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I. The offer to show by oral evidence that, at the time the contract was executed, the writing was agreed to be a sham, if admissible, would certainly afford a very expeditious mode of evading the rule that the written contract shall exclude all oral stipulations or deductions made at the same time. If this evidence is equivalent to an offer to show that it was part of a scheme to impose upon the plaintiff's creditors, or others, it would not be competent for the party to thus escape from his contract. He should nevertheless be bound by his undertaking. In any other view the offer seems to be an attempt to contradict and evade the effect of the writing by oral evidence. The extent to which the evidence was allowed in the court below seems, certainly, all that could be justified by the rules of evidence.

The plaintiff was allowed to show the condition and the circumstances under which, and the object for which the writing was given, and that he had paid the price of the horses so as to defeat the defendant's claim, but not to contradict or vary the terms of the written contract.

II. The objection that this was a mere pledge, and that allowing the property to go back into the possession of the pledgor extinguished the right, is sound, if the premises are maintainable. But the transaction was intended, obviously, to secure the defendant, consistently with the possession remaining in the general owner. This is what is meant by a mortgage of personal estate. One of the important distinctions between a mortgage of personal estate, and a pledge is, that in the former case, the general owner may, as between the parties, retain possession of the chattels, and in the latter, the special owner must have possession of them. The same terms, which create a pledge if the possession passes, will often be held to create a mortgage; ordinarily, perhaps, if the possession is to be retained by the general owner. Another important distinction between a pledge and a mortgage of personal property is, that in the former only a special property passes, and in the latter, the general property.

It is obvious, in the present case, according to the plaintiff's own testimony, that the purpose and object of the transaction was to create a security to the defendant, for signing the note to Scofield, and to do this by mortgage of the three horses, and the other property,

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with the agreement that the defendant might take possession of the property at any time he chose. Under this state of the case, we do not see how the plaintiff can expect to maintain this action, without first paying the notes, and demanding his property.

Judgment affirmed.

LEONARD GILMAN v. WILLARD ANDRUS.

Husband and wife.

A husband is liable for property, suitable to his situation and circumstances in life, which is procured by his wife while she is living with him, if, after knowledge of the fact, he permit her to retain it; and especially where the person who furnishes the property has reason to believe, from his previous dealings with the husband, that the wife is authorized to contract for it.

BOOK ACCOUNT. The facts in the case are sufficiently stated in the opinion of the court, which, after argument by

Edson & Aldis for the defendants; and by

G. F. Houghton and *H. R. Beardsley* for the plaintiff,

was delivered by

ISHAM, J. The only matter in dispute, in this case, is in relation to item No. 5, in the plaintiff's account, it being for a plate of mineral teeth prepared for the defendant's wife. The auditor has found that the plaintiff rendered the service, and that the charge is reasonable in amount, but that no express promise has ever been made by the defendant to pay the account. The question arises, whether one will be implied.

The plate was furnished while the defendant and his wife were living together, and was suitable to the defendant's circumstances and station in life. It is expressly found that the defendant permitted his wife to keep the plate, after it came to his knowledge that she had procured it of the plaintiff. The fact that the defen-

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dant did not then repudiate the contract, and cause the plate to be returned, will render him liable for what it was reasonably worth. In *Waithman v. Wakefield*, 1 Camp. 121, Lord Ellenborough held that, "where a husband is living in the same house with his wife, "he is liable to any extent for goods which he permits her to receive there; she is considered as his agent, and the law implies a "promise on his part to pay the value." Cohabitation itself furnishes presumptive evidence of the husband's assent to contracts made by the wife for necessities suitable to his degree and estate; 2 Smith's Lead. Cas. 372. The assent of the husband arising from that circumstance may be rebutted; but nothing existed in this case at the time the plate was furnished, that affected that presumption. The plaintiff, from the previous dealings which he had had with the defendant, had reason to believe that the wife was authorized to contract for the plate. It is stated by the auditor that the plaintiff had been previously, and shortly before the plate was contracted for, employed by the defendant's wife as a dentist, for which services the defendant does not dispute his liability. The defendant also had a previous conversation with the plaintiff in relation to furnishing the plate, in which the defendant told him that he should have the work done as soon as he was able. Those circumstances, in connection with the fact that he has permitted his wife to retain the plate during the whole period of their cohabitation, are sufficient to show her authority to make the purchase, and the defendant's liability; even, if the plate could not strictly be treated as necessities. We are satisfied, however, that the defendant is liable upon either of those grounds.

The judgment of the county court is affirmed.

Bellows v. Bingham.

HIRAM BELLOWS v. ROYAL T. BINGHAM, *apt.**Contract.*

M. C. contracted to work for the defendant for an entire term, and before its expiration gave the plaintiff an order for a part of his wages. The defendant accepted the order so far as he was owing M. C. or should be owing him at a subsequent specified time. Soon after this acceptance, and before the expiration of the term, M. C. abandoned the defendant's service and absconded, thereby damnifying the defendant to a greater amount than would be due him, *pro rata*, for the time he had labored. *Held*, that the defendant's acceptance was absolute and unconditional as to the amount then due, and obligated him to pay the plaintiff the wages of M. C., *pro rata*, to the time of the acceptance, without deduction on account of the damage subsequently sustained. ✓

ASSUMPSIT on an order drawn by Moses Cart on the defendant, in favor of the plaintiff, and accepted by the defendant, said order and acceptance being as follows:

"Mr. R. T. Bingham: *Sir*,—Please to pay Hiram Bellows
"seventy-five dollars in cash and one hundred and twenty-five dol-
"lars in good saleable young cattle, by the first day of October
"next. *Fletcher*, February 25th, 1852."

(signed)

"MOSES CART."

"I accept this order, so far as I am owing said Moses Cart, or
"shall be owing him the first of Oct. next. February 25, 1852."

(signed)

"R. T. BINGHAM."

The execution and acceptance of the order were admitted, and on the trial of the case the following facts appeared.

On the 6th of October, 1851, Cart entered into a written agreement with the defendant to work for him for two years from that date, for the sum of five hundred dollars; one hundred and fifty dollars in cash and three hundred and fifty dollars in cattle, grain and produce; payable part in the month of January, 1853, and part in the month of January, 1854. The order was given to apply, when paid, on notes which the plaintiff held against the said Cart.

The plaintiff, at the time the order was accepted, knew of the existence of a contract between the defendant and Cart, by which Cart was to labor for the defendant for some period of time then unexpired; and that the indebtedness of the defendant to Cart, whatever it might be, was for wages under said contract, but he

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did not know of the particular stipulations of said contract, further than is above stated.

Cart commenced work under the contract at its date, and continued to work under it until about the 31st of March, 1852, when he absconded from the state and abandoned his contract, without the knowledge or consent of the defendant;—and the defendant sustained a loss, much more than the amount due from him to Cart, in consequence of Cart's abandoning said contract.

Upon the foregoing facts, the county court, June Term, 1855,—PECK, J., presiding,—decided that the defendant, by his acceptance, had bound himself to pay to the plaintiff whatever balance he owed Cart at the time of the acceptance; and, from evidence in the case, the court found that the defendant was owing Cart eighteen dollars and sixty-eight cents, computing the time which the said Cart had worked, by the month, at the rate of five hundred dollars for two years, without deducting anything for damages for abandoning the contract, and rendered judgment for the plaintiff for that sum, to which the defendant excepted.

H. G. Edson for the defendant.

H. R. Beardsley for the plaintiff.

The opinion of the court was delivered by

BENNETT, J. The defendant's acceptance of the draft of Cart upon him, is *special*, and we must look to the terms of it to learn the extent of the defendant's liability upon it. The language of the acceptance is, "I accept this order *so far as I am owing Moses Cart*, or shall be owing him the first of October next." It seems Cart was to work for the defendant under a special contract of the 6th of October, 1851, for the term of two years from the date of the contract, for the sum of five hundred dollars, part payable in January, 1853, and a part payable in January, 1854. On the 31st of March, 1852, Cart quit his work, without the fault of the defendant, and run away; and the case finds that the defendant's damage occasioned by the breach of the contract on the part of Cart, was more than what he was owing Cart for the time he worked for him under the contract. Though it should be conceded

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that Cart could not maintain an action against the defendant, yet that is not the test of the defendant's liability. The acceptance was had while Cart was in the employ of the defendant under his contract, and looks to two periods of time, 'the present and the future. We think the acceptance binds the defendant to pay to the extent he owed Cart for labor at the time he accepted his draft, though by the terms of the contract between the defendant and Cart it did not become due and payable until a future time. The language is, "I accept this order so far as I am owing Cart," clearly referring to the time of acceptance. If the defendant, in his acceptance, did not take the precaution to protect himself against the contingency that thereafter happened, the plaintiff should not be the loser by it. We are to presume the plaintiff acted upon the faith of this acceptance, and, as to him, the defendant must be bound by it. The defendant cannot be bound to pay anything on his acceptance for what transpired subsequent to it. Nothing was owing from the defendant to Cart on the first of October subsequent to the acceptance. The defendant might well set off the damages he had sustained against any claims which Cart could make upon him, if he had any, and there is nothing in the latter clause of the acceptance which can preclude the defendant from making use of the same matter as a defense against this plaintiff.

Judgment affirmed.

THE HEIRS OF GEORGE F. SAWYER, *apls.* v. MARY H.
SAWYER.

Widow's maintenance during settlement of her deceased husband's estate.

The statutory provision for the maintenance of the widow of a deceased person during the settlement of his estate, has a general application; and the probate court have a discretion only as to the amount of the allowance, and cannot refuse it altogether where the widow has other abundant means of maintenance.

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A widow is entitled to an allowance for such maintenance, though there be no children.

The statute does not require such allowance to be made in advance of the expenditure.

The amount of the allowance is a matter resting in the discretion of the probate court, or of the county court upon an appeal; and is not ordinarily subject to revision, upon exceptions, in the supreme court.

APPEAL from a decree of the probate court allowing the appellee \$500 for her maintenance during the settlement of the estate of her late husband, George F. Sawyer.

It appeared that the deceased died intestate in June, 1852, leaving the appellee, his widow, and leaving no children; and that he was, at the time of his decease, a purser in the United States navy, in which capacity he had served for fifteen or twenty years previous to his death.

Letters of administration were granted to the appellee in August, 1852; and the settlement of the estate was duly proceeded with, and the decree appealed from was made at about the time of the settlement, by the appellee, of her account as administratrix.

The intestate died leaving an estate of about eighteen or twenty thousand dollars, consisting of a lot and dwelling-house in Burlington, worth about two thousand dollars, and the residue in money and stocks, principally money, and leaving no debts due from him except for a trifling amount.

It did not appear that the widow had any property except what she was entitled to by law out of her husband's estate, except that, since the death of her husband, she had been in the receipt of a pension, from the government of the United States, of \$240 per year, allowed her as widow of an United States naval officer, commencing at his death and to continue for five years.

It appeared that since the death of the intestate, the appellee had resided in the family of her father in St. Albans, but without any agreement as to the terms on which she was so to reside, and without anything being said as to her paying for her board until about the time of her petition for an allowance for support, when she told her father she expected to, and would pay him for her board for the time she had lived, and should live with him.

It was conceded that the appellee's father was a man of wealth,

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and that he as well as his daughter, (the appellee,) had been accustomed to live in the style of, and associate with the first circles in society.

The appellants, being the brother and sister, and heirs of the intestate, insisted that the widow was not, by law, entitled to any allowance for support; and that, if she was entitled to anything, the allowance by the probate court was too large.

The county court, June Term, 1855,—PECK, J., presiding,—affirmed the decree of the probate court with costs.

Exceptions by the appellants.

A. O. Aldis and *H. R. Beardsley* for the appellants.

G. F. Houghton and *B. H. Smalley* for the appellee.

The opinion of the court was delivered, at the circuit session in September, by

REDFIELD, CH. J. This is an appeal from the court of probate in the matter of allowing maintenance to the widow of the intestate during the settlement of the estate; and comes into this court upon exceptions to the decision of the county court, affirming the decree of the court of probate.

The statute, upon the subject of this allowance, is very specific and unlimited. It is "the widow and children, constituting the family of the deceased, shall have such reasonable allowance out of the personal estate, as the probate court shall judge necessary for their maintenance during the progress of the settlement of the estate, according to their circumstances."

Here, it is obvious, no discretion is given the probate court to disallow such maintenance, in any case, unless upon the interpretation of the word reasonable, or as the court shall judge necessary. And it would certainly be a very unusual interpretation to put upon such terms, in their connection here, to say they were intended to regulate the discretion of the court in what cases to allow such maintenance, when, from their relation to other members of the sentence, it is obvious that the only question intended to be referred to the court, under the terms, was the amount of the allowance, according to the circumstances of the family. We can only

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determine the purpose and intent of a statute by the words used, and the connection, and the subject matter. From all these it is very obvious the statute was intended to have a general application.

The exceptions claimed in the present case are, first on the ground of the pension which the widow obtained, as such, upon the decease of her husband. This is not different, in principle, from her being possessed of ability to maintain herself in any other mode, so as not to require assistance from the estate. And indeed the general ability of the appellee, or the widow in this case, from her living with her father, and the wealth of the family, and the very great improbability of his making any personal claim against his daughter for her board, was also alluded to in the argument, and is stated in the case, and seems to us to come fairly under consideration, in the same connection. But we are not prepared to say that any such exception can fairly be engrafted upon the statute, If it had been the purpose of the legislature to allow maintenance only in the case of such widow and children as were without the means of subsistence, in any other mode, it is difficult to conjecture how it occurred that the provision should have been expressed in the general and unlimited manner it here is. It is incomprehensible that, if the provision were intended only for the indigent and necessitous, it should have been made general. It is, at all events, sufficient for us that, the provision being general, it must be allowed to have a general application.

II. Some question was made in the argument, whether the statute did not require the allowance to be made by the court in advance of the expenditure. We do not think that indispensable, or that in practice it is generally done, or that, in the majority of cases, it would be the desirable mode of accomplishing the thing. It is probable, in practice, that the administrator would make the expenditure, as the necessity occurred, and have such sum allowed, in the settlement of his account, as the court deemed reasonable; and this seems to us the fair exposition of the statute.

III A question is made, whether, there being no children, the widow is entitled to such allowance. This would certainly be adopting the most literal construction of the statute; and, in pursuance of the same line of argument, it might almost be inferred, perhaps, that

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as the statute makes the provision only for the widow and *children* of the deceased, the provision should not extend to a single *child*. But no such literal interpretation can be allowed in such cases, for we have an exposition of the extent of the provision, in the very next clause of the sentence, "constituting the family of the deceased." If he leave a widow and child, or children, or either, or all, he, or she, or they constitute the family of the deceased, within the purview of the statute. Any other interpretation would savor of a degree of refinement which could not fail to do injustice in its general application, however it might affect particular cases, or a single case. And the analogous provision in the 48th chapter, § 29, in regard to the settlement of testate estates, provides in terms, for both widow and children, *or either*. "And the probate court may make such reasonable allowance as may be judged necessary for expenses of the maintenance of the widow and minor children, or either, constituting the family of the testator," &c. Unless, then, we are prepared to make a difference in the application of this provision to testate and intestate estates, which we think no one can claim, the statute is perfectly specific upon this point.

In regard to the amount of the allowance, that is a matter resting altogether in the discretion of the probate court, or of the county court upon appeal; and not ordinarily subject to revision, in this court, upon exceptions, the case coming here only, as upon a writ of error. Judgment affirmed.

MARY H. SAWYER, *apl.* v. HORACE B. SAWYER AND MARY C. SAWYER, *heirs of* GEORGE F. SAWYER, *deceased*.

Wearing apparel. Descent of the real, and distribution of the personal estate of deceased persons. Rights of a childless widow.

Neither the watch, or its chain, key and seals or the finger ring which were usually worn by a person when living, are to be deemed a part of his wearing apparel, which,

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after his decease, are, by § 1, of chapter 50 of the Compiled Statutes, to go to his widow. REDFIELD CH. J., *dissenting*. Otherwise of a bosom pin.

Nor are the sword and sword-belt, which an officer in the United States navy wore, in accordance with the regulations of the navy department, to be regarded as a part of his wearing apparel, within the meaning of the above statute; REDFIELD. CH. J., *dissenting*. But his epaulets are.

The widow of a person who left no issue is, if his real estate exceeds \$1,000, entitled to that sum, and to one half of the residue *forever*; and she takes this *by descent*. She is also entitled to one half of the personal property, which is left for distribution.

To entitle her to this distribution, it is not necessary that she should avail herself of the provisions of § 6 of chapter 54 of the Compiled Statutes; nor is her right, in this respect, affected by the first provision in § 1 of chapter 50 of the Comp. Stat., when she claims no assignment under it.

APPEAL from an order of the probate court, in reference to the disposition and distribution of the estate of George F. Sawyer, deceased, intestate.

The intestate, George F. Sawyer, at the time of his decease, and for a period of about twenty years previous thereto, an officer, in active service, as purser in the United States navy, left a sword and sword-belt, and epaulets, which he wore during his life, in compliance with the laws of the United States and the regulations of the navy department, also a watch and watch-key, gold watch-chain, seals, with a black cord watch-chain to which was attached a gold head, a finger ring, and a breast or bosom pin, all of which were usually worn by the deceased on his person, upon all proper occasions, during his lifetime. His widow, Mary H. Sawyer, claimed all the above mentioned articles as part of the wearing apparel of her deceased husband.

The county court, June Term, 1855,—PECK, J., presiding,—decided that the watch, watch-key, chain, cord, seals, and the finger ring usually worn by the deceased on his finger, and the sword and sword-belt, were not to be deemed a part of the wearing apparel of the deceased; and that his widow was not entitled to them, as part of his wearing apparel; to which decision the said Mary H. Sawyer excepted.

The court further decided that the epaulets and bosom pin were to be deemed a part of the wearing apparel of the deceased, and that the said Mary H. Sawyer was entitled to them as such; to

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which decision the heirs of the said George F. Sawyer excepted.

It appeared that the intestate died in June, 1852, leaving no children or their legal representatives, and no father, but leaving, among other heirs in the next degree, a brother, Horace B. Sawyer, and a sister, Mary C. Sawyer, who, in their own right, and by assignment and devise, were entitled to all the estate of the intestate, except so much as the widow was, by law, entitled to. The intestate left for distribution, after defraying the expenses of settling the estate and paying the debts, eighteen or twenty thousand dollars, consisting of about two thousand dollars in real estate, and the residue in personal property, mostly in money.

The widow had never made any application to the probate court for dower, or to have any of the personal estate set to her; nor had any been set to her except the wearing apparel of the deceased, *as such*, and an allowance to her for her support during the settlement of the estate.

The widow claimed that, in addition to the share in the real estate, to which she was entitled, she was entitled to one half of the personal property left for distribution.

The heirs claimed that, by the statutes of this state, the widow was not entitled to any part of the personal estate, and that they were entitled to the whole personal estate.

The court decided that of the real estate the widow was entitled to one thousand dollars, and one half the residue thereof, forever; and that she was entitled to one half the personal estate left for distribution, to which decision the said heirs, Horace B. and Mary C. Sawyer excepted.

A. O. Aldis and H. R. Beardsley for the appellees.

G. F. Houghton and B. H. Smalley for the appellant.

The opinion of the court was delivered, at the circuit session in September, by

BENNETT, J. The statute enacts that, upon the death of the husband, the widow shall be allowed all her articles of apparel and ornament, and the wearing apparel of her husband. I should think it was the intention of the legislature, to include in the terms

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"all the articles of apparel and ornament of the wife," most, if not all those things which, at the common law, go to make up her paraphernalia, which, it is well understood, is of two kinds, clothing, bedding, &c., suitable to her condition in life, and secondly, her ornaments. But when, in contrast to this language, they simply give her the *wearing apparel* of her husband, I think the legislature intended the term should be used in a more restricted sense, and be confined to its popular meaning, and include only such articles as may be properly termed the clothing of the husband, in contradistinction to ornaments. The primary motive of the legislature in giving the wearing apparel of the husband, upon his decease, to the wife, was not to make a provision for her support, but to save her from the mortification of seeing his apparel the subject of disposition or sale, as the case might be, for the benefit of creditors, which, ordinarily, would be but of little use to creditors, but in the case of ornaments, which many times are expensive, there may be a strong equity why creditors of an insolvent estate should have the benefit of them. The county court held that the watch, watch key, watch chain, cord and seals, and the finger ring, and the sword and sword belt, were not to be deemed a part of the wearing apparel of the deceased husband, and a majority of the court think this was a sound construction of the statute. They seem to me to fall clearly within the category of ornaments. To call them wearing apparel would be, as it appears to me, to give a latitudinarian meaning to the term, which the legislature never intended it should have. Though a watch may have a further use than mere ornament, yet that is not enough to make it and its incidents wearing apparel. The finger ring is peculiarly matter of ornament; and we are disposed to consider the sword and sword belt but emblems of distinction worn on special occasions, and which were in no way attached to the wearing apparel, so as to become a part of it. The belt may well be regarded as an incident to the sword. The regulations of the navy require them to be worn in foreign courts, purely as a badge of distinction. The epaulets were attached to the coat, which must be regarded as wearing apparel, and may well follow their principal. So with the bosom pin, it is attached to the shirt, and serves to keep it in place, and there is no showing in the case that the pin was of an

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extravagant value, whatever effect such a showing should be permitted to have. A majority of the court are disposed to affirm that part of the decree of the county court, in relation to the claim of the widow as to the wearing apparel of her deceased husband.

In respect to the decree making a distribution of the property, the court are unanimous in affirming the decision below.

The 1st section of the statute, chapter 55, provides, among other things, that the widow, upon the death of the husband, if there be no children, and his real estate shall exceed the sum of one thousand dollars, (which was this case,) shall have one thousand dollars, and one-half the remainder of such real estate forever. We see no objection to the proceedings of the county court, in relation to the real estate, and indeed none is seriously made by the counsel. Chapter 55, § 1, regulates the descent of real estate, and it is quite evident the widow, where there is no issue, is to have, in the first place, \$1,000 out of the real estate, where the estate exceeds that sum, and if less, she is to have the whole forever.

The main controversy is in relation to the distribution of the personal estate. It is claimed by the heirs to the estate, that the widow is not entitled to any part of it. I apprehend that the first section of chapter 55, of the statute relates solely to the descent of real estate, and though the word estate might well comprehend both real and personal, yet the subject matter upon which that section is to operate, seems to be confined to lands, tenements and hereditaments, or some right thereto, or interest therein, and that being so, the term, the whole of his estate, in the second provision in relation to the descent of estates, should, I think, be confined to real estate, or some right or interest growing out of it.

But the first section of chapter 50 of Comp. Stat. p. 334, provides that, after certain things are accomplished, the residue of the personal estate shall be distributed in the same proportions, and to the same persons, and for the same purposes, as is prescribed for the descent and distribution of real estate. We think this statute, taken in connection with the one relative to the descent and distribution of real estate, must govern the case before us.

It is said in argument that the wife does not take a moiety of the real estate of her husband, where there are no children, by descent

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but by appointment of law. This can be hardly correct. The fee of a moiety in such case goes to the widow absolutely and forever, and where the statute casts the fee upon any one, they may well be said to take by descent, and only in that way. We think the widow may well claim a moiety of the personal estate of her husband, under the last provision of section 1, chap. 50, of the statute, which declares that personal property shall go to the same persons and in the same proportions as is prescribed for the descent of real estate.

It is claimed by the heirs of the estate that the widow has lost all claim to the personal estate, by not availing herself of the provisions of sec. 6, chap. 51, in the revised statutes, which answers to sec. 6, chap. 54, in the compiled statutes, p. 363. It may be true that, if the widow claimed the benefit of that section, she must have waived the provisions made for her by law within eight months. But her failure to make the waiver in proper time does not operate as a forfeiture of the provision made for her by law as a childless widow. It only defeats her from the right of coming and claiming *dower* in her husband's estate, which might, in case of insolvent estates, be more beneficial to her than the provision made by law for her to have a moiety of the estate in fee, after the payment of the debts, &c.

So in regard to any benefit which the widow might claim under the first provision of sec. 1, chap. 50, of the Compiled Statutes. If she claimed the benefit of an assignment of personal property by the court of probate, it must be on condition that she had waived the provision made for her by law; but if she chooses not to avail herself of the provisions of that section, (which sometimes it may be for her interest to do,) she may still have the provision which the law has made for her, which is a moiety of the personal and real estate, after the payment of the debts, *i. e.*, over and above the one thousand dollars. It was not, we think, the object of the legislature, in the provision of the first part of sec. 1, chap. 50, in regard to a childless widow, to limit her right or claim under the 6th provision in that section, but to give her an option of waiving any right under the 6th provision, and claiming, by an assignment from the court of probate, in case the estate was insolvent or greatly in debt.

The court of probate had no power to make an assignment of

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personal property to this widow, in lieu of her claim to the personal estate, unless she preferred to waive her claim; and if she did not, whatever was left after the payment of the debts, funeral charges, and expenses of administration, might well be regarded as *the residue* of the estate, and, as such, would, by the last provision in sec. 1, chap. 50, of the Compiled Statutes, go to the same persons and in the same proportions as is prescribed for the descent and disposition of the real estate; and we have already attempted to show that this widow, under the statute regulating the descent of real estate, takes out of the real estate, first, one thousand dollars, and a moiety of the residue *in fee, forever*, and that this is taking by *descent*, and, as matter of right, to all intents and purposes under the statute.

The decree of the county court is, in all things, affirmed, but as both parties excepted to the decision below, without costs.

REDFIELD, CH. J., dissenting. I do not choose to go very much in detail into the particulars of this case.

In regard to the wearing apparel of the husband, it seems to me there is ordinarily very little ground for question. And, as it almost never happens that the personal ornaments which one chooses to wear, or the few unimportant articles which one carries or wears about the person, involve much value to any one but the particular relatives and near friends, it seems desirable to me to give this provision a reasonably liberal construction in favor of the widow.

All the articles here involved, it is probable, and many others which may be supposed to exist in other cases, would avail but little towards paying debts, or swelling the amount of money for distribution. They are of almost no value, except to one who felt an interest in the person of the deceased, far less than new articles of the same description; but to the widow ordinarily, it may be presumed, they will be of far more value, and a good deal in proportion to the time they have been used by the husband.

I could not, therefore, entertain any doubt in regard to the military dress, epaulets and sword of the deceased. It was strictly dress, and nothing else. The sword was as strictly dress as the epaulets, and that as much as the coat. It was none of it worn

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exclusively for covering or for comfort, but chiefly for ornament.

So, too, of the pin and ring, they are as strictly dress as one's sleeve buttons, or, indeed, as the buttons upon the back of the coat, or as anything, indeed, which is not strictly indispensable.

But the watch, perhaps, is more questionable. And still it seems to me that a watch which one wears, and the chain and seals are dress and apparel, and, as such, should go to the widow. It may not be necessary for upholding life within the statute exempting apparel from attachment. But I think it should be held exempt from taxation, and belong to the widow as "wearing apparel." But, upon inquiry and examination, both in this state and in other states, where they have a similar statute, I think the practical construction has been to regard a lady's watch as part of her apparel and ornaments, and thus belonging to her, but that the husband's watch is part of the estate, and does not go to the widow.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF GRAND ISLE.

AT THE

JANUARY TERM;

AND AT THE

CIRCUIT SESSION, IN SEPTEMBER, 1856.

PRESENT,

HON. ISAAC F. REDFIELD, CHIEF JUDGE.

HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.

HON. MILO L. BENNETT, }

JUDSON B. FLETCHER v. SAMUEL PHELPS AND BENAJAH PHELPS.

Lands bounded on lakes and creeks.

Lands bounded on Lake Champlain extend to the edge of the water at low water mark. The same rule applied, in this case, to lands near the lake bounded on a creek emptying into, and the waters of which ordinarily maintain the same level, and rise and fall with those of the lake; there being no claim made that the boundary should extend to the centre of the creek.

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ASSUMPSIT, founded upon a written agreement of the defendants to pay the plaintiff twenty-two dollars for each acre of a farm of land in South Hero, deeded by the plaintiff to Samuel Phelps and George Phelps. Plea, the general issue; trial by jury, August Term, 1854,—PECK, J., presiding.

The land deeded to Samuel and George Phelps was described in the plaintiff's deed as the south part of lot No. 88, bounded north by Abner Keeler's land, east by the lake and the creek, south by lands of Gardner Tracy, and west by lot No. 89. The only question in dispute was in reference to the eastern boundary of this lot, the plaintiff claiming it to be a line indicated, on a plan of the premises, as the Fletcher survey; and the defendants claiming it to be a line further west, indicated on the plan as the Phelps survey;—between these two lines it was admitted that there was a space of five acres and one hundred and fifty-two rods of land; the line claimed by the defendants being near the eastern border of the hard land, corresponding with the line of bushes hereafter mentioned;—and the line claimed by the plaintiff being near the western bank of the channel hereafter mentioned, which he claimed was the creek proper;—no part of said channel being included in the five acres and one hundred and fifty-two rods. The plaintiff's testimony tended to show that there was a creek which connected with the lake near the north side of the land in question and extended southwardly about two miles; and that, opposite the premises in question, it was about sixty or seventy rods wide in high water, gradually growing narrower as you proceeded south; that in the middle of the summer there was but very little water in the creek, and that confined to the channel near the centre; that in the centre there was a channel from one to two rods wide, varying in width in different places, and somewhat crooked; that this channel was a little lower than the surface of the land on each side; that no vegetation grew in the channel, and that the five or six acres in dispute lay between the hard land west, which was skirted by a line of bushes or small trees and this channel, and that it lay low, nearly on a level with the lake, and was covered with water, from the lake, every spring, till sometime in June; that from 1810 to 1816 it was a quagmire, of no value and capable of no use or occupancy; and that it was not used for any purpose until 1816,

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when some wild oats and other vegetables began to grow there, and that it had been gradually filling up and improving ever since; that the occupants of the hard land on the west had occupied this low tract in question in connection with the hard land, whenever the low land was susceptible of occupation.

The defendant offered to show that, by the original allotment of the town, the lots were sixty-four acre lots; that the lot in question measured down to the east border of the hard land seventy acres; that the land in dispute was navigable for vessels, every year, by water setting up from the lake; and that it was covered with muskrat houses; and that after the water in the lake fell, and about mid-summer, cattle strayed on the land in question,—but that no vegetation grew on it, except such as was about worthless and was not used except in years of great scarcity of hay, and in such cases a great portion and most of the fodder cut on it was flags and bull-rushes; that the land itself rose and fell more or less with the rise and fall of the water of the lake; that the surface of the land in the lowest water was never a foot above the surface of the water in the lake; that the land was susceptible of no cultivation, and that teams never had been and never could be driven upon it; that this whole strip of land had always been known and called “the creek,” by people of the vicinity; that there were no distinct banks to the channel of the creek, but that what the witnesses on the part of the plaintiff called the channel was a narrow strip in the middle of this low creek land, in which no vegetation whatever grew; that it was slightly depressed in the centre and gradually rose to the edge of the low tract in question, where vegetation, such as described, grew, and from that point to within one or two rods of the hard land it was entirely level, and that from there, for a rod or two, it gradually and slightly ascended to the hard land; that the creek and creek land extended in length about one and a half or two miles south of the land in question, gradually growing narrower at the south end, and connecting with the lake only at the north end; that the rise and fall of the water in the creek was caused by the rise and fall of the water in the lake; and that the water in the creek came wholly from the lake, except the surface water from the adjoining land in time of rains, and some small springs upon and above the land in question, which were

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drained off in the dry portion of the season through the channel of the creek.

The defendant offered to show in what manner the continuation of this strip of land had been regarded and treated by the owners of the adjoining lands in their occupancy of it, and by reference to their conveyances of the adjoining lands, and the records of divisions of it, and what conversation was had by the plaintiff both at the time of, and subsequent to the making of the contract and conveyance in question.

There was no evidence offered, nor was it claimed by the defendants, that the land in dispute was ever set to any other lot than the one bounding on it on the west,—or that it was ever occupied or claimed by any one else than the occupants of the lot deeded; but the defendants did claim that it was not set in the allotment of the town, (which was many years ago,) to said lot. It appeared that there was, in the allotment of the town, a tier of lots on the west side of the creek, but no plan or survey of the town was introduced to show whether the lots bounding the creek run to the channel of the creek or not.

The evidence offered by the defendants was objected to by the plaintiff, and the court excluded it, as having no tendency to show that the tract in dispute ought to be excluded in the estimate of the price of the land; to this the defendants excepted, and thereupon submitted to a verdict under the direction of the court to the jury to include the land in dispute in estimating the aggregate price of the land to be paid for under the contract.

G. Harrington for the defendants.

H. R. Beardsley for the plaintiff.

The opinion of the court was delivered, at the circuit session in September, by

ISHAM, J. The question in this case is one of boundary. The matter in dispute is determined by ascertaining the eastern line of the lot which was conveyed by the plaintiff to George and Samuel Phelps, by his deed of May 4, 1850. The question becomes important in order to determine the number of acres embraced in the

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deed, for which the defendants are to pay the plaintiff, per acre, the price stipulated in their contract. The lot is described in the deed as being bounded on the "*lake and the creek.*" The plaintiff insists that the creek is limited to the crooked line, *or the Fletcher survey*, as marked on the plan, and that all the land west of that line should be measured to ascertain the number of acres contained in the deed. The defendants, on the other hand, insist that no land was conveyed by the deed any further east than the dotted line or Phelps survey, as indicated on the plan, which runs on the border of what is termed the hard land, thus excluding the low land lying east of that line. The land thus excluded appears to be low land lying but little above the surface of the lake, and consequently is so much inundated in times of high water that it is rendered of no use for cultivation, and of no great value for pasturage or meadow. The quantity of land in dispute is five acres and one hundred and fifty-two rods; for which the plaintiff seeks to recover, in this action, the price stipulated to be paid per acre for the whole farm. The court excluded the evidence offered by the defendants, and directed the jury to include the land in dispute in estimating the aggregate price of the land under the contract; thus establishing the eastern boundary of the lot as being on the Fletcher survey, but not so as to embrace any part of the channel of the creek. We are satisfied that the defendants have no reason to complain of that direction of the court to the jury.

As a general rule, if the description of the land in a deed is ambiguous or doubtful, or if the lines and monuments referred to are lost or destroyed, parol evidence of the practical construction given by the parties, by acts of occupancy, recognition of monuments or boundaries, is admissible for the purpose of identifying the land, and in aid of the interpretation of the deed. *Stone v. Clark*, 1 Met. 378; *Waterman v. Johnson*, 13 Pick. 261; 1 Greenl. 301, note. But when no ambiguity exists, and the parties, in describing the land, have used terms and language in the deed, referring to known, existing, and permanent monuments, it is the duty of the court to give to the description and the language of the parties a legal construction; and parol evidence is no more admissible to control its legal effect than it is of any other stipulation of the parties contained in the deed. It is for the court, in such cases,

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to decide what is embraced in the deed, and to definitely determine its lines and boundaries. Where land is sold and bounded on a river or stream of water above tide-water, the grant extends to the middle of the channel or thread of the stream. That is the legal effect of the conveyance, and it cannot be varied or controlled by parol testimony. *Tyler v. Wilkenson*, 4 Mason 397; *Claremont v. Carelton*, 2 N. H. 369; *Hooper v. Cummings*, 20 John. 91; Angel on Water Courses, § 11-12, and notes. The same principle applies where land is bounded upon an artificial pond, as a mill-pond and the like. *State v. Gilmanton*, 9 N. H. 461; *Hathorn v. Stinson*, 1 Fairf. 238. But a different rule prevails where land is conveyed bounded on large natural ponds or lakes; in such case, the grant extends to the water's edge, or if, as observed by CH. J. SHAW, in *Waterman v. Johnson*, 13 Pick. 261, the lake or pond have a definite low water line, the grant will extend to low water mark. *Canal Commissioners v. People*, 5 Wend. 423; *State v. Gilmanton*, 9 N. H. 461. Such is the legal effect which is given to conveyances of that character.

In relation to the premises in question, so far as they are bounded on the lake, no difficulties have arisen between these parties. The line extends to the edge of the water at low water mark. The same rule, we think, should be applied to land bounded on this creek. In times of high water on the lake, this creek appears to be but little more than an arm or inlet of the lake itself, as the rise and fall of the water in the creek depends upon the rise and fall of the water in the lake. There is a small rivulet or stream which passes through the centre of this low land to the lake, when it is not overflowed, the bed of which is distinguished by being some lower than the rest of the low land. At low water on the lake, the stream is limited to this channel, and is, to some extent, supplied with water from inland springs. Whether the measurement of the farm should have been extended to the centre of that stream or not, is not the question before us, as the court limited the line to the bank of the stream at low water, to which the plaintiff has taken no exception. That the line of this lot, as given in the deed, extends to the bank of that stream, and that all west of that line should be included in the measurement in ascertaining the number of acres in the farm, we have no doubt, as it was land

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conveyed by the deed, the title to which passed to the grantees, and for which, if the plaintiff had withheld the possession, the defendants could have sustained the action of ejectment. That part of the evidence which was offered by the defendants in relation to the character and quality of the land in dispute, was, therefore, properly rejected.

The same principle will exclude the evidence offered in relation to the original allotment of the land, the sale of contiguous land and its occupancy by others, the records of division, and the conversation of the parties at the time of the conveyance, &c. *The lake and the creek* mentioned in the deed are existing and natural monuments, and when called for by the deed, control quantity, lines, courses and distances;—as monuments of that character afford the highest and best evidence of the intention of the parties. *Howe v. Bass*, 2 Mass. 380; *Wendall v. Jackson*, 8 Wend. 190; *Butler v. Widger*, 7 Cowen 723; *Rich v. Rich*, 16 Wend. 663; 8 Phil. Evid. by Cowen & Hill 1379; 1 Greenl. Ev. § 301, note. Those monuments, therefore, must control the legal effect of this grant; and parol evidence is inadmissible to establish other boundaries, as there is no ambiguity in the deed, nor any uncertainty as to the monuments referred to. We see no error in the ruling of the county court on this subject.

The judgment of the county court is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ADDISON.
AT THE
JANUARY TERM;
AND AT THE
CIRCUIT SESSION, IN JUNE, 1856.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

EDWIN LAWRENCE v. ISRAEL DAVEY.

Dependent covenant. Assumpsit.

The plaintiff covenanted to deliver to the defendant certain quantities of coal before certain specified dates, and the defendant covenanted to pay the plaintiff "for the above named coal" a specified price, "to be paid the first of each month, for all delivered." *Held*, that the defendant's covenant was dependent, and only bound him to pay, at any particular time, for the amount of coal delivered, if all had been then delivered which was required by the plaintiff's covenant.

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The plaintiff's testimony tended to prove that after a delivery of a less quantity of coal than the contract required, he informed the defendant that he could not fulfill, and if the defendant intended to take advantage of it he should not deliver any more, and that he should deliver no more unless the plaintiff ~~paid~~ for it irrespective of the contract; and that thereupon the defendant said that he wanted the plaintiff to deliver the coal, and that he would not take any advantage, but would pay for the coal delivered. *Held*, that this testimony, if believed, would entitle the plaintiff to recover in assumpsit for the coal then and thereafter delivered, without any reference to the quantity stipulated for.

ASSUMPSIT. The plaintiff and defendant entered into a written contract, under seal, which was as follows, viz.

*"Contract made and concluded the first day of September, 1853, between Israel Davey of * * * of the first part, and Edwin Lawrence of * * * of the second part.*

"The said party of the second part covenants and agrees to, and with, the said party of the first part, to deliver at his forge in Salisbury, sixty-eight thousand bushels of good hard wood coal, to be delivered as follows: thirteen thousand bushels to be delivered before the first day of December next, twenty thousand bushels more before the first day of April, 1854, and the balance before the first day of September next following. The said party of the first part covenants and agrees to pay said party of the second part for the above named coal, six dollars and fifty cents per hundred bushels, to be paid the first of each month for all delivered."

Under this contract, the plaintiff delivered a quantity of coal, but less than 13,000 bushels, between the first of September and the first of December, 1853, and a further quantity, but less than 20,000 bushels, between the first of December, 1853, and the first of April, 1854. All the coal delivered before the first of March, 1854, was regularly paid for. There was no coal delivered during the month of April. The plaintiff claimed to recover in this action for the coal delivered in the month of March, and for that delivered subsequent to the alleged arrangement in May hereafter mentioned. The whole amount of coal delivered before the commencement of the suit did not amount to the quantity specified in the contract.

Upon a trial by the jury, at the June Term, 1855,—PIERPOINT, J., presiding,—the plaintiff's testimony tended to prove, in addition to the foregoing facts, that, in May, 1854, the plaintiff told the defendant that he should not be able to fulfill the contract, and if he (the defendant) was going to take advantage of the contract, he

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(the plaintiff) wanted to know it then, for if the defendant intended to take advantage of the contract, he would not deliver any more coal; and that the defendant then said that he wanted the plaintiff should deliver the coal, and he would not take any advantage of the plaintiff on the contract, but would pay for the coal delivered; and that the plaintiff then told the defendant he should not deliver any more coal, unless the defendant paid for it irrespective of the contract; and that the plaintiff delivered the coal, understanding he was to be paid for it, although he did not fulfill the contract. There was no evidence tending to prove any abandonment or relinquishment of the contract, other than as above stated, or that any other place, quantity, or time of delivery was named than is specified in the contract.

The defendant claimed that the facts which the plaintiff's evidence tended to prove, did not constitute an abandonment of the written contract, by the defendant, so as to entitle the plaintiff to recover in this action.

But the court instructed the jury that, if they found that the defendant, in May, assured the plaintiff that if he would go on and deliver coal, that he would pay for the coal so delivered, without reference to the contract, and would take no advantage of the plaintiff on the contract, and that he would also pay for the coal delivered in the month of March, that they should find for the plaintiff to recover for all the coal delivered after the first of March, but if they did not so find, the plaintiff was not entitled to recover in this action.

Verdict for the plaintiff; exceptions by the defendant.

Harrington & Prout and *J. Pierpoint* for the defendant.

O. Seymour and *C. Linsley* for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. We think the testimony given by the plaintiff in the present case did tend to show that the defendant, after a failure of the plaintiff to perform strictly according to the stipulations of the special contract, did agree, upon sufficient consideration, to waive such failure, and accept of the remainder of the coal,

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although not delivered strictly according to the terms of the written contract, and pay for them at the stipulated price; and that the testimony was properly submitted to the jury, as tending to show a waiver of the special contract, so far as to enable the plaintiff to recover for the coal delivered and accepted, although not strictly in conformity with the stipulations of such special contract. And this being found by the jury, the plaintiff was entitled to recover the stipulated price of the coal delivered; and in this form of action, inasmuch as he could not recover, under the special contract, without alleging that the coal, for which he sought to recover, was delivered in conformity with the stipulations of such contract. For, although the contract contains stipulations to make monthly payments, it is only for such coal as shall have been delivered, from time to time, under the contract. We think, therefore, that it would not be giving this special contract its proper force, to say that the stipulations for payment are independent covenants, depending for their consideration upon the covenants of the plaintiff, and not upon his performance of them. The fact undoubtedly is, that the obligation of the defendant to pay, under the special contract, depends exclusively upon the performance of the plaintiff, and we think it fair to say that the meaning of the parties undoubtedly is, that the monthly payments are only to be made, upon condition that the plaintiff does deliver not only some of the coal, and such as he claims payment for, from time to time, but that in the whole he delivers all that the contract stipulates, and in the time stipulated. Any other view of the contract would make the contract unreasonable.

It is true that, if such a contract contain a stipulation to make payments in advance of the delivery of the goods, or performance of service, this does, of necessity, render the covenants independent. But we do not so understand the present contract. In this view of the case, it seems to come clearly within the principle of repeated decisions of this court, following in the line of *Porter v. Stewart*, 1 Vt. 44. *Sherwin v. R. & B. R. Company*, 24 Vt. 347.

And, although the promise to waive the contract was after some portion of the coal sought to be recovered had been delivered, and so delivered that probably the plaintiff, if the defendant had insisted upon strict performance of the contract, could not have recovered

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anything for it, yet, nevertheless, the agreement to waive the contract, and the promise, and, above all, the delivery of coal after this agreement to waive the contract, and upon the faith of it, will be a sufficient consideration to bind the defendant to pay for the coal already received.

Judgment affirmed.

WILLIAM H. WHITE & MOSELY D. HALL v. OLIVER BASCOM,
THOMAS VAUGHN, HENRY F. GAYLOR & SILAS HINCKLEY.

Bailee's right of action for injuries to property in his possession or under his care.

A bailee of property, who has an interest in it, may maintain an action in his own name for any injury done to it, either tortwise, or by the breach of any obligation or duty which another may be under, in reference to it.

By a contract between the plaintiffs, one of them was to furnish a boat, and the other take charge of running it for the purpose of transporting merchandise, the profits of which business was to be shared by them equally. *Held*, that, for an injury or breach of duty by a third person in reference to the boat, by which it was lost, an action might be maintained and the value of the boat recovered in the name of the plaintiffs jointly.

The plaintiffs engaged the defendants to tow for them a boat containing merchandise which the plaintiffs were transporting as common carriers, and which was afterwards lost by the neglect and want of ordinary care of the defendants. *Held* that the plaintiffs might recover the value of the merchandise lost, though they had not paid the owners, or received any pay for the transportation of it.

ACTION ON THE CASE. The declaration alleged that the defendants were engaged in the business of towing boats on Lake Champlain; and the plaintiffs in running canal boats to and from Vergennes and Troy, for the purpose of forwarding, transporting, and freighting goods, &c.; and that by a contract between them, the defendants became obligated, carefully, skillfully and prudently, to tow the plaintiffs' boats, with their contents, on Lake Champlain, between Whitehall and Fort Cassin, (points between Troy and

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Vergennes;) that, in November, 1853, the defendants received to be so towed a boat of the plaintiffs containing merchandise, belonging to different persons named, which the plaintiffs were transporting as common carriers; and that, while being towed by the defendants, the boat and its contents were lost and destroyed by means of the carelessness and want of skill and prudence of the defendants, &c.

The action was referred, and the referees reported that the defendants were guilty as the plaintiffs had alleged, and that they found for the plaintiff to recover \$2,482,02 damages and their costs; and they further reported the following facts.

The plaintiffs entered into a contract, by which White was to furnish boats, and Hall was to devote his personal services to carry on the business of transporting merchandise, by means of the boats, to and from Vergennes and Troy, and were to share equally the profit and loss of the business; but Hall had no other interest in the boats, one of which was the boat mentioned in the declaration, for the loss of which the plaintiffs claimed to recover. The referees decided that the plaintiffs were not entitled to recover for the boat for the reason that it was not the joint property of the plaintiffs, but that if the court were of the opinion that the plaintiffs had such an interest in the boat, as to entitle them to recover for its loss in this action, then that the plaintiffs should recover the sum of \$600,00 in addition to the sum of \$2,482,02, making the whole sum \$3,082,02.

It appeared that the defendants were engaged in towing boats, as stated in the declaration; and the plaintiffs claimed that the defendants were liable as common carriers for the boat and cargo. But the referees decided that the defendants were not liable as common carriers for the same, but that the defendants were liable for the damage the plaintiffs sustained, in consequence of the neglect of the defendants, or their servants, to exercise ordinary care and diligence in towing the boat for the plaintiffs. It appeared that the plaintiffs had not paid the owners of the goods which had been received by the plaintiffs as common carriers, and were lost with the boat, nor had they received any pay for the freight of the goods. The defendants contended that for that reason the plaintiffs were not entitled to recover for such goods; but the referees

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decided that they were; the said sum of \$ 2,482,02, being for the value of the goods so lost, and the interest thereon.

The county court, June Term, 1855,—PIERPOINT, J., presiding,—rendered judgment, upon the report, for the sum of \$ 2,482,02, to which the defendants excepted; and to the disallowance of \$ 600,00, for the loss of the boat, the plaintiffs excepted.

E. J. Phelps for the defendants.

The defendants are directly responsible to the owners for the loss, upon their contract, (with the owners, in legal effect,) to use due care in the towing; *Sanderson v. Lamberton*, 6 Binney 129; and thus may be subjected to an action in favor of each owner, as upon the contract; and to such action a recovery here would be no bar.

Through the bankruptcy or fraud of the plaintiffs, the fruits of a recovery might never reach the owners. A court of law lacks power to distribute the fund. Even if the defendants may be considered as agents, or sub-contractors of the plaintiffs, without privity with the owners, then the plaintiffs, to recover, must prove "a real loss, or actual damage, and not merely a probable or possible one." Story's Agency, § 222; *Mainwaring v. Brandon*, 8 Taunt. 202. In any view the contract is the real basis of liability, whether the action be assumpsit or in tort.

The legal effect of this contract was this,—that the defendants would use ordinary care in towing the goods, or pay all damages consequent on their breach of contract,—to the owners of the goods, (if lost,) their value,—to the plaintiffs, such damages as they might sustain.

Now the plaintiffs may be regarded as guarantors, to the owners, of the defendants' contract; and the defendants are obliged to indemnify the plaintiffs against loss from the breach of the contract on their part.

Regarded as a contract of indemnity, the plaintiffs cannot recover without first proving a claim made against them, and actual payment; *Taylor v. Mills*, Cowp. 525; *Powel v. Smith*, 8 Johns. 249; Sedg. Dam. 308 and seq.

The plaintiffs cannot recover for the boat upon the facts found. It was the separate property of one of the plaintiffs.

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J. Pierpoint and *F. E. Woodbridge* for the plaintiffs.

The possession of the property, and a liability to account for it to the owner, is sufficient to enable the person having such possession to maintain an action against a wrong-doer for any injury to it; *Story on Bail.* page 73, § 93 and 4; 2 *Saund. R.* 47; *Bac. Abt. Bailment, D.*; *Angel on Com. Car.* p. 343; 1 *B. & A.* 59, *Rooth v. Wilson*; 2 *Bing.* 173, (or 9 *C. L.* 368;) *Croft v. Allison*, 9 *Com. L.* 528.

The plaintiffs, in this case, have a special property in the boat, being entitled to her use during their business, and her earnings being their joint property; this special property is sufficient to enable them to recover in this action; *Story on B.* 261. § 394.

The fact that the plaintiffs had the goods lost in their possession, as common carriers, entitles them to recover their value of the defendants in this case, without having paid the owners. Their right to recover does not depend upon their *having paid*, but upon their possession and *liability to pay*. See authorities above cited.

The opinion of the court was delivered, at the circuit session in June, by

REDFIELD, CH. J. The important question, and, in one view, the only question in the present case, is, whether a bailment, coupled with an interest, is a sufficient title to enable the bailee to recover the value of the goods of one to whom he entrusts them for the purpose of transportation, the bailee in the second instance not being a common carrier, but only a special one, and liable for ordinary neglect.

The general principle of the law in regard to this point seems to us sufficiently settled. Ordinarily, any one having the possession of goods, even by finding, or by tort, has a sufficient title to recover the value against a mere wrong-doer, or any one who undertakes to perform service about the goods, and fails in ordinary skill and diligence. This principle of the law is of very long standing. The person who is guilty of tort, or who fails to perform his duty according to his undertaking, or the general obligation of his craft or position, cannot ordinarily dispute the title of him from whom he took, or received the possession. Naked possession is a sufficient title against all the world, except him who has a superior

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title. And the law will presume the possessor, either by finding, bailment, or mere tort, has the consent, and the title of him in whom resides the better right, until *he* shall connect himself with the wrong-doer in some way. Until that, the wrong-doer must show a right to do as he has done. It is no justification to him, to impeach the plaintiff's title.

Accordingly, it is every day's practice in the courts of common law, for the bailee, who is not accountable over, to bring suits for any injury to the goods either by force or negligence. Accordingly the hirer of a horse, or one who has him in possession, by the consent of the owner, may sue any one who commits a direct trespass, or who fails in duty, either express or implied, in regard to the property. It was never heard, in such case, that the trespasser, the mechanic who shod, or the inn-keeper who kept the horse, could excuse their own misconduct or failure in duty, by showing a right in some third person, superior to the bailors'. But in all these cases it is an undisputed point, that the general owner may sue also, if he choose; and if the suit is brought by the special owner, the law presumes it is by consent of the general owner, and he alone can interfere.

And in our judgment, the case of a common carrier of goods, who employs the assistance of others in accomplishing his own undertaking, whether those persons be private persons or other common carriers, may maintain an action for any tort, or breach of duty or obligation in such persons, and the action is not defeated, by showing that such carrier has not paid the owner of the goods. And this, notwithstanding the general owner might also sue. The right of action in such case is not, in any sense, dependent upon having indemnified the owner for his loss, or even of being liable to do so; but upon possession coupled with an interest, or in other words possession, independent of the general owner. For if the possession be that of the owner, as in the case of a servant, the action must be brought in the name of the general owner. But in all cases where the plaintiff had, at the time of the injury, the actual possession, or where he delivered the possession to the defendant for some specific purpose, he may sue, and the action cannot be defeated, through any defect of title in the plaintiff; 1 Chitty's Pleading, 51. Both the general owner and the special owner can-

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not sue at the same time, and judgment in favor of one is a bar to a suit by the other; 2 Saund. 47 b.; id. c. d; Bull. N. P. 33. The numerous cases upon the subject will be found referred to in these elementary works, and need not be here repeated. And if the plaintiffs had hired this boat for use, even for a single trip, they might undoubtedly recover the loss in this action. For that would give them the possession, and a special interest or property in the boat. And the fact, that the plaintiffs had the boat in their joint use, would seem to give the same right to sue a stranger to the title, for an injury, as if they had obtained it of a third person. The boat was clearly in the joint use of the plaintiffs, and the earnings were their joint property. If a stranger had owned it, the recovery would make them liable to pay the owner; and so, in the present case, the recovery will enure for the benefit of the owner as between the plaintiffs themselves. But this is not a question which the defendants can raise. The contract was between the defendants and the plaintiffs jointly; and the plaintiffs had the right to use the boat jointly, and to contract, as they did, with the defendants; so that they are bound by the contract to the full extent, and cannot go into any questions arising between the plaintiffs, inasmuch, as the recovery is a full bar to all other claims for the boat, by any one standing in privity with the plaintiffs. So that in regard to the goods, and the boat, it would seem, the plaintiffs had such an interest as to enable them to recover for the loss; and that the instituting such a suit, and its proceeding to final judgment, by the acquiescence of the person or persons having the general property, will conclude their rights, the same precisely, as if the suit had been in their names. We think, therefore, judgment must be reversed, and judgment given for the larger sum.

Exr. of Larrabee v. Larrabee.

SAMUEL H. HOLLEY, *Ex'r* of JOHN S. LARRABEE v. CHARLES W. LARRABEE.

Construction of will.

If a testator, in a codicil to his will, make a disposition of a portion of his property, which is inconsistent with the disposition which he had previously made of it, in the original will, it will operate *pro tanto* as a revocation of the original provision.

Application of this principle in the present case.

A bequest to C. L., in case he outlived L. L., to whom the use of it, during her life, had previously been given, of "such part of the personal estate as may then remain," which was made in a codicil, *construed* as conveying all the personal estate that remained after the decease of L. L., without regard to the disposition which had been made of it in the original will; and as not limited to such personal property as remained otherwise undisposed of by the original will.

TRESPASS for taking certain articles of household furniture which belonged to the estate of John S. Larrabee, deceased. The testator, by his will, dated April 11th, 1842, disposed of his household furniture, as follows: "I give and bequeath to my beloved wife Lydia Larrabee, the use of all my household furniture during her natural life, and after her decease, I do give and bequeath the same to my daughters" (naming them) "to be equally divided among them," and, after giving several specific legacies to different persons, made the following bequest, "I give, bequeath and devise the use, rents, and profits of the remainder of my real and personal estate, after the payment of the aforesaid legacies, to my beloved wife Lydia Larrabee, during her natural life, and after her decease, I do give, bequeath and devise the same to my son Charles W. Larrabee, to hold to him and his heirs forever.

On the 8th day of October, 1847, the testator added a codicil, in which were the following provisions: "I hereby revoke the devise and bequest made in my said will, to Charles W. Larrabee, and to his heirs, of the reversion of all my estate, after the payment of legacies, and after the decease of my wife, and in lieu thereof, I give, devise and bequeath to my said son Charles W. Larrabee, and to his heirs forever, in case he outlives my wife Lydia Larrabee, all my real estate, and such part of the personal estate as may then remain, excepting from this devise the stone store, the

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"wharf, and the store-house on the wharf, and charging it with certain specific legacies named in said will, and in this codicil. And "whereas the said Charles W. Larrabee has lived and worked "with me many years, for which he has received no recompence, "and for which he should be paid; in consideration of which, in "case the said Charles W. Larrabee should die before my said "wife, it is my will, and I hereby give and devise to the legal heirs "of the said Charles W. Larrabee, an equal undivided half of my "real estate, except the stone store and wharf, as aforesaid, and the "other half, after the payment of legacies, as aforesaid, to my children, and their legal representatives in equal shares, and to come "in possession after the decease of my said wife."

It appeared that the widow, Lydia Larrabee, had deceased, and the defendant admitted the taking of the property, and it also appeared that all the debts against the estate had been paid. Upon this showing, the county court, June Term, 1855,—PIERPOINT, J., presiding,—decided that the furniture in question was given to the defendant by said codicil, and, upon that ground, gave judgment in his favor.

Exceptions by the plaintiffs.

O. Seymour and W. F. Bascomb for the plaintiff.

I. The bequest made in the original will of the furniture to the daughters of the testator, to wit, to Sophia Holley, Mary Manning, Amelia Holley, Electa C. Seymour, Martha W. Baker, Sarah Ann Morris, and to his daughters-in-law, Eliza Ann Chipman and Charlotte N. Baldwin, constituted a specific and vested legacy.

That it was specific, see 1 Swift's Digest 453; 2 Williams on Executors 994-1006, notes *m.* and 1010.

That it vested, see 2 Williams on Executors 1065; 2 Black. Com. (Wendell's ed.) 513, note 49, 514 note 51: 1 Jarman on Wills 726-7, (761).

The legacy thus vested was subject only to the use of the widow, and to pay the debts of the estate. See 1 Swift's Dig. 453; 2 Williams on Executors, 1051-2 and 1035, note *s*; 2 Blackstone's Com. 513.

For the payment of debts, general legacies would abate before specific. See 1 Swift's Dig. 453 and 456; 2 Black. Com. 513.

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A specific legacy is not liable to contribution, on failure of assets to pay other legacies. 2 Williams on Executors, 994, 1006, 1010.

II. The codicil does not revoke the bequest of the furniture, as made in the will.

1. It does not revoke it expressly, although expressly revoking several other bequests.

2. It does not revoke by necessary implication.

The codicil is part of the will. 1 Williams on Executors 175 and 179; and every part of the will ought, if possible, to be made to take effect. See 2 Black. Com. 379; 2 Williams on Executors 931, 4.

It is necessary that a latter provision in a will should be clearly incompatible with a former one to defeat it. See 4 Kent's Com. 531 and 535, note (2). Also see general rules of construction in 1 Jarman on Wills 160, and 165.

The expression "such part of my personal estate as may then remain," fairly construed, means, such part as is not otherwise disposed of. It is the proper expression to use, on the supposition that the furniture was meant to be otherwise disposed of, and thus the codicil on this subject is entirely consistent with the original will.

3. It is a general rule that a specific legacy is not revoked by a general revocatory clause in a subsequent will or codicil. See 1 Williams on Executors 183, and vol. 2 1007, note *p*; *a fortiori*, it is not revoked by mere implication.

4. The phraseology, "such part of my personal estate as may then remain," cannot fairly be interpreted so as to include the furniture, but directly the reverse.

On the interpretation given by the defendant, the testator ought to have said *all* my personal estate, for it would all remain at the decease of his wife.

J. W. Stewart and *O. Linsley* for the defendant.

By the codicil to his will, the testator revokes the bequest to his son Charles, and in lieu thereof bequeaths to Charles one-half of his real, and such part of his personal estate as may remain after the decease of his widow, in case Charles survives her, (excepting the stone store, wharf &c.)

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No mention is made in the codicil of the household furniture. But, by its terms, the furniture must fall within the denomination of "such part of his personal estate as may remain" after the decease of the widow, and would go to his son Charles. This disposition is inconsistent with the original will, and must, therefore, be regarded as overruling it. A good reason may be assigned for this change, and which substantiates that such was the intention of the testator, inasmuch as, in the first place, he gives the whole residue of his real estate to Charles, and, in the second, but half, the other half going to his daughters. Having thus, by the last arrangement, bestowed the half of his real estate upon his daughters, he might well make a change, relative to the furniture, in favor of Charles.

The pecuniary legacies are chargeable upon the personal as well as real estate, and the furniture falling under the former denomination, must be applied towards payment of the pecuniary legacies. 6 Bacon's Abg. 292.

The opinion of the court was delivered, at the circuit session in June, by

ISHAM, J. The provisions in the original will are free from any ambiguity in relation to the disposition of the property for which this action is brought. The household furniture is given to the widow of the testator, during her life, and after her decease to his daughters, who are named in the will, and is not charged with the payment of the legacies. The remainder of the estate, real and personal, after the decease of the widow, is given to the defendant, and on it the payment of the legacies are charged. It would seem that the testator intended to give to the defendant all the property of the estate, from which the legacies were to be paid. The widow having deceased, the household furniture, by the original will, is vested in the daughters, and such is now their right, unless by a subsequent disposition of that property, that right is taken from them.

The defendant has taken possession of this household furniture, and he claims to be the owner of it under a codicil to this will, executed by the testator on the 8th day of October, 1847. There is no express revocation of the gift of this furniture to the widow and daughters, yet, if there was made a subsequent disposition of

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it, inconsistent with the former bequest, it will operate *pro tanto*, as an implied revocation, and the property will pass as subsequently appointed. *Brant v. Wilson*, 8 Cowen 56. Wigram on Wills 154. 4 Kent's Com. 531. The codicil contains this provision: "I hereby revoke the devise and bequest made in my will to Charles W. Larrabee of the reversion of all my estate, after the payment of legacies, and after the decease of my wife; and in lieu thereof, I give, &c, to my son Charles W. Larrabee, and to his heirs forever, in case he outlives my wife, all my real estate, and such part of my personal estate as may then remain, excepting the stone store, the wharf, and the store house," which, by the will was to be sold, and its avails divided among his daughters. If the widow survived, then only an equal and undivided half of the real estate is given to the legal heirs of Charles W. Larrabee. The testator continued to some, and enlarged to others, the legacies given in the original will, and made what he termed the specific legacies to certain persons named in the codicil, a charge upon all his estate, real and personal, except the stone store, wharf, and store house. The household furniture will pass to the defendant under the general language of this bequest, for it is a gift of all his real and personal estate, that shall remain; not that which remains undisposed of in the original will, but that which remains after the decease of the widow, and after the payment of the legacies. Those legacies being paid, and the store, wharf, and store house being sold, and their avails divided among the daughters, the remainder of the estate, after the decease of the widow, is given to the defendant. That such was the intention of the testator, is gathered from the various provisions in the codicil. The testator, in the codicil, has expressed a desire to do better by the defendant than he had done in the original will. It is not reasonable, therefore, to suppose that he would enlarge the amount of the legacies, to be paid by the defendant, and limit his right to the real estate in case he should decease before the widow, without giving him the benefit of the personal property, on which the payment of the legacies are charged. That this furniture is charged with the payment of the legacies, is a matter of express provision, for the charge is made to rest on all the estate, real and personal, except the store, wharf, and store house. The exception of that property

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shows that it was the intention of the testator that it should pass, as devised in the original will, and not be affected by the codicil. If the testator had intended that the furniture should pass as bequeathed in the will, and not be affected by the codicil, he would naturally have excepted the furniture also. The same reason that led to the exception of one, would also have led to the exception of the other. The fact that the furniture was not excepted, is evidence that the testator intended that it should pass to the defendant, under the provision in the codicil. We think, therefore, that the defendant is entitled to this furniture, under the codicil, and as the property is not wanted by the plaintiff, for the payment of debts, nor for any other object but to dispose of the same as directed by the will of the testator, the plaintiff has no claim to it as against the defendant, which will enable him to sustain this action.

The judgment of the county court is affirmed.

ELIAS MOSS v. WILMARTH HINDES.

Pleading.

In an action of trespass for taking property, the defendant plead the organization and existence of a school district, the warning and holding of a school meeting, the voting of a tax, the plaintiff's liability therefor, its assessment by the prudential committee, the issuing and delivery to the defendant of a warrant for the collection of the tax, his proceedings in taking the plaintiff's property, as collector, by virtue of the tax bill and warrant, &c.;—to which the plaintiff replied that the supposed tax "was not legally and duly assessed by the then prudential committee of said school district upon the lists of said district." *Held*, upon special demurrer, that a single issue was thereby presented, and that the replication was sufficient.

TRESPASS, for taking a pair of oxen and seven cows. The defendant justified the taking as collector of a school district. His plea averred the organization and existence of the district,—an

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application and warning for, and the holding of a school district meeting,—the voting of a tax,—the liability of the plaintiff to be taxed in that district,—that the prudential committee duly and legally assessed the tax voted on the grand lists of the inhabitants, &c.,—the issue and delivery to the defendant, who was the collector of said district, of a warrant for the collection of said tax, and his proceedings in calling upon the plaintiff, and afterwards taking and disposing of the property referred to in payment of the tax against the plaintiff. To this plea the plaintiff replied that he ought not to be barred, &c.,—"because he says that said supposed tax, under "which the defendant attempts to justify the taking of said pair of "oxen and seven cows was not legally and duly assessed by the "then prudential committee of said school district, upon the lists "of said district, as averred in said plea, and of this he puts him-"self upon the country for trial."

To this replication the defendant demurred, and assigned, for special cause of demurrer, "that the said replication is informal, double and not issuable, and is so framed and constructed that no certain formal and single and material issue can be taken thereon, in this, that the said replication avers that the said supposed tax, under which the defendant attempts to justify the taking of said pair of oxen and seven cows, was not legally and duly assessed by the then prudential committee of said school district, upon the lists of said district, thus making the issue rest upon several separate and distinct points, and involving more than a single issue, whereas the said defendant should have set up in *what* point said tax was illegally assessed by said prudential committee upon the lists of said district, and thus have formed but a single issue. And also for that the said replication is, in other respects, uncertain, informal and insufficient," &c.

The county court, June Term, 1855,—PIERPOINT, J., presiding,—adjudged the replication insufficient. Exceptions by the plaintiff.

O. Seymour and *L. E. Chittenden* for the plaintiff.

The replication in this case is sufficient. It takes issue upon a single averment in the defendant's plea, and is not multifarious. *Robinson v. Raley*, 1 Smith's Leading Cases 500, and notes.

If matter of law and fact is joined in the plea, or in any one

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avermment in the plea, it is then traversable, for this is the only mode by which the facts are to be settled, on which the law depends. 1 Chitty's Pleading 613.

P. C. Tucker and J. Pierpoint for the defendant.

The replication rests upon the ground that the school tax, under which the defendant acted, "was not legally and duly assessed by the then prudential committee." It is contended for the defendant that this embraces *more* than a single point. It involves the organization of the school district, the correctness of the grand list, the action of the clerk of the district, the legality of the district meeting, the choice of its officers, as well as the assessment of the tax itself, and a variety of other matters, part of record and part not of record, part matter of law and part matter of fact. Each of these constitutes a single point in itself, which the plaintiff is at liberty to traverse and try, but he may not legally so frame his replication as to force the defendant to prove them all.

The opinion of the court was delivered, at the circuit session in June, by

ISHAM, J. The replication in this case denies the averment which is made in each of the several pleas in bar, that the tax was duly assessed by the prudential committee, upon the lists of the district, as therein averred. It is insisted that the replication is defective in not being single, that it puts in issue two or more separate and independent facts, each of which constitutes a defense to the action, and that it is subject to the same objections which would exist to the general replication *de injuria*. Whether a general denial of the several pleas, under the replication *de injuria*, could be sustained or not is not now the question in the case, as this replication is not of that character, nor is it subject to similar objections. The only inquiry arising under this replication is, was that tax duly assessed? To assess a tax, is to fix and ascertain the true amount to be paid by each person liable to be taxed. That is the ordinary meaning of the word, and in that sense it was used in the statute directing the duties of the prudential committee in making up a school district tax. Comp. Stat. 149, § 41. The testimony under that replication would be confined to the single inquiry whether

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the prudential committee, from the vote of the district and the grand list, did truly ascertain and fix the true amount to be paid by each inhabitant of the district, and was the true amount ascertained and fixed against the plaintiff? The organization of the school district, the legality of that district meeting, the vote of the tax, and the liability of the plaintiff to be assessed, are facts which must precede in order of time the action of the committee in making the assessment or rate bill, and, if those facts were put in issue by this replication, it might possibly be subject to the objections which have been urged. But we are satisfied that those facts are not parcel of the issue, nor are they involved in any inquiry arising out of the matter stated in this replication. Those facts are all material and traversable, but as they are not denied by the replication, they are, on the face of the pleading, admitted to be true, as averred. We think the replication is a good answer to the plea in bar.

The judgment of the county court is reversed, and judgment is rendered for the plaintiff.

Leave to amend was granted on the usual terms.

THE TOWN OF SALISBURY *v.* THE TOWN OF MIDDLEBURY.

Record of warning out process.

A precept, in due form, warning a person to depart the town, under the law of 1801, and the return of a sufficient service of it was copied upon the book of records in the town clerk's office. An attestation in the following words, "received this warning on record," properly dated and signed by the town clerk, made at the lower left hand corner of the precept, but above the return, was held to refer to, and include the return as well as the precept.

The word warning, as used in the attestation, included both the precept and the service of it.

APPEAL from an order of removal of John Fuller, a pauper, from the town of Salisbury to the town of Middlebury.

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It was admitted that the legal settlement of the pauper was in the town of Middlebury unless his father, under whom such a settlement was claimed, was warned to depart that town in the year 1813. To prove such a warning, the town of Middlebury introduced an original book of records of said town, wherein was recorded the warning relied on. The county court, December Term, 1855,—PIERPOINT, J., presiding,—decided that the record was not sufficient evidence that the warning and officer's return were seasonably recorded; and that the settlement of the pauper was therefore in the town of Middlebury, and that he was duly removed, &c. Exceptions by the defendant. (There was no copy of the town clerk's record furnished to the reporter, nor any statement respecting it, except that contained in the opinion of the court.)

J. A. Beckwith for the defendant.

J. Prout and *E. J. Phelps* for the plaintiff.

The opinion of the court was delivered, at the circuit session in June, by

BENNETT, J. The only question in this case involves simply the validity of the proceedings under the act of 1801, in warning the father of John Fuller to depart the town of Middlebury. No objection is taken as to the form of the warning out process, or of its service, as spread upon the book of records of the town of Middlebury, which was offered in evidence; and they seem in all things to comport with the requirements of the statute; but the county court excluded the book of records from going to the jury upon the ground, it would seem, that it did not sufficiently appear that the return of the constable had been recorded within the time required by the statute. The precept for the warning out of Benjamin Fuller was issued by the selectmen of Middlebury on the 19th of May, 1813, and was served the 1st day of June, 1813, as appears by the records.

The statute of 1801, first section, after giving the form of the precept, and prescribing the mode of service, proceeds; "which precept the said constable shall return with his proceedings thereon to the town clerk of such town, within eight days after serving the

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same, which precept and return, it shall be the duty of the town clerk to enter upon the records of said town." We find upon the book of records, placed at the left hand of the names of the selectmen, who issued the precept for warning out Benjamin Fuller, and preceding the return of the officer who served it, the following attestation of the town clerk; "*Middlebury, 1st of June, 1813; Received this warning on record.*"

Attest.

SETH STORRS, *Town Clerk.*"

If this *attestation* is sufficient, in other respects, to show the time when the precept and the service of it was entered upon record, can the particular location of the attestation upon the book of records, have the effect to defeat its operation? It would, it is true, be more natural to have the *attestation* follow the officers return; and in looking at the book of records, this seems to have been the case in other instances, in which the town clerk has used the same form of attestation. The particular location of this attestation may have been accidental; but from the appearance of the book itself, I should think it was resorted to in order to give room upon the same half sheet for another record of the same kind. It is not essential that the town clerk should follow any certain consecutive order, in making the record; and if, in point of fact, the *attestation* was made before the town clerk had transcribed upon the record the return of the officer, it would not vitiate the record. By his spreading the return upon the record, though subsequently, he adopted it as a part of his record, and virtually attested it; and it is quite immaterial, whether the *attestation preceded* or *followed* the return, if, by a fair intendment, the attestation is to be understood as including the record of the officer's return; and we think it should be so intended in this case. The certificate of the attestation is, "received this warning on record." The warning a person to depart a town implies a notice to such person to quit, and involves a service upon him of the precept issued by the selectmen; and though the precept may be termed a warning in common parlance, yet in the statute, which provides for the service, it is with great propriety called a *precept*; and it does not take the legal character of a notice or warning, until service of it has been made. We think it was in this sense that the town clerk, in his attestation, used the term *warning*; and that the term involves a service of

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the precept, as being necessary to constitute a *warning*. In looking at the book of records, we find that in all other cases, where the attestation follows both the precept and the service of it, this same town clerk has used the expression, "rec'd this warning on record." There can be no doubt, he intended the attestation should include, in the term *warning*, both the precept and the service; and we think by intendment, it may well have that effect. On the whole, then, we are satisfied that the attestation is sufficient to show that both the precept and the service of it was entered upon the records of the town by the town clerk in due time to give them a legal effect. It will follow, from the case, as made by the exceptions, that the pauper was unduly removed.

The judgment of the county court is reversed, and the cause remanded.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF RUTLAND,

AT THE

FEBRUARY TERM;

AND AT THE

CIRCUIT SESSION, IN JUNE, 1856.

PRESENT,

HON. ISAAC F. REDFIELD, CHIEF JUDGE.

HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.

HON. MILO L. BENNETT, }

HENRY C. TAFT *v.* THE TOWN OF PITTSFORD.

Highway. Town order.

A petition for the discontinuance of a highway, laid by the selectmen, but not yet built, does not suspend, or prevent their immediately proceeding with the building of the highway.

An appeal by a landowner from the laying of a highway vacates the previous orders of the selectmen respecting it, and suspends all their operations and proceedings for the purpose of building the road.

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A person who has contracted to build a road, laid by the selectmen, cannot proceed with his contract, after he receives notice of such an appeal, and recover of the town therefor.

Nor can he recover upon an order given by the selectmen for work performed after receiving notice of such an appeal.

The order counted upon, in the present case, *held* to have been given for such work, and not in compromise of a claim for damages for such a termination of the contract.

ASSUMPSIT. The declaration contained a special count upon the town order, hereafter described, and the general counts for money, work and labor, materials, &c. Plea, the general issue; trial by jury, March Term, 1855,—PIERPOINT, J., presiding.

The plaintiff read in evidence the order counted upon, which was signed by a majority of the selectmen of the town of Pittsford, and had been presented to the treasurer for payment, and was in the words following:

"The town treasurer is directed to pay Henry C. Taft one hundred dollars, it being in part payment in building road from depot to foot of Town hill. *Pittsford*, September 26, 1853."

From the other testimony of the plaintiff, it appeared that a road was laid out by a majority of the selectmen of Pittsford, in June, 1853, from the depot to the foot of Town hill; and that about the first of August, 1853, said selectmen made a contract with the plaintiff to build said road, which was two hundred and six rods in length, for \$2 per rod, \$100 to be paid as soon as he performed labor on the road to that amount; the work to be commenced as soon as any of the landowners would consent; that the landowners for about half the distance soon thereafter consented, and the plaintiff commenced work under his contract, and, at the date of the order, had performed labor to the amount of \$100; and, in payment therefor the above order was given.

The defendants offered in evidence a petition to the county court of Ashur Burditt and others, for the discontinuance of said highway, which was served on the 12th of August, 1853, with a record of the proceedings thereon, and claimed that the plaintiff could not recover for any work performed under his contract, after the service of that petition. This evidence was objected to, and the court excluded it, to which the defendants excepted.

The defendants further offered in evidence a petition to the

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county court, of Chester Granger and Joseph Tottingham, land-owners, objecting to the laying of said highway, which was served on the first of September, 1853, together with the proceedings thereon, which resulted in the discontinuance of said highway; accompanied with proof that the plaintiff was present at the time said petition was served, and knew in reference to it, and that he was then requested to give up his contract, but refused. This testimony was objected to by the plaintiff, but was admitted by the court, and, in reference to this testimony, the jury were instructed that the plaintiff could not recover upon the order, if the value of the labor performed on the road up to the first of September, 1853, did not amount to \$100, or, if any part of the order was for work and labor performed by him on said highway after the first day of September, provided he then received the notice which the defendants' testimony tended to show was given.

The plaintiff offered evidence to prove that he made expenditures in preparing to execute his contract for building said highway, in the purchase of tools and otherwise, before the first of September, 1853; but this testimony, being objected to, was excluded by the court; and the court further charged the jury that, under his general counts, the plaintiff could not recover for any expenditures made in preparing for the work, and that he could only recover for the value of the labor performed up to and including the first day of September, if, upon that day, he received notice of the land-owners' appeal. Evidence having been introduced as to the value of the work done up to, and including the first day of September, the jury found it to be \$5, and returned a verdict in favor of the plaintiff for that sum. To the admission of the defendants' testimony which was objected to, and to the exclusion of that offered by the plaintiff, and to the charge of the court, as above detailed, the plaintiff excepted.

Briggs & Hyatt for the plaintiff.

W. H. Smith and Roberts & Chittenden for the defendant.

The opinion of the court was delivered by

REDFIELD, CH. J. It was decided by this court, during the last year, in the county of Franklin, that county orders are not negotia-

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ble, when made payable to order, chiefly upon the ground that the question of the authority of the judges, in drawing the order, should be kept open to examination, into whosever hands the orders might come. The same reason would apply, with even greater force, to town orders drawn by the selectmen. But see *Dalrymple v. Whitingham*, 26 Vt. 345.

If the selectmen had no power to make the contract for building the road, at the time they made it, or, if the appeal of the landowners suspended all right to proceed with the work, then the order is not binding, unless it can be maintained as the compromise of a controverted claim, or in some other mode.

1. The order, upon the face, professes to be in part payment for building the road, and not a compromise of a claim for damages, by not being able to complete the work, and no proof seems to have been given to sustain the order upon any such ground.

2. The declaration does not count upon any such claim for damages. It cannot, therefore, be urged as a substantive ground of recovery aside from the order.

3. Something was said that the plaintiff should be allowed to recover for materials which the plaintiff had provided, with the purpose of using them in this work. The difficulty here is, that such materials could not be recovered for, under the general counts, until they had been put to the defendants' use, which is not shown in the case.

It would seem that the case must turn chiefly upon the effect of the appeal of the landowners. For, although there may be some ground to question the propriety, ordinarily, of selectmen going forward and building a highway, before the time, limited by statute, for the owners of land to throw the same open to be worked, we are not able to see any satisfactory ground upon which the power to do so, by consent of the landowners, is denied. And, if they have the power to build the road, and charge the town with the expense, they could, of course, make the contract they did with the plaintiff. But it seems to us that his right to charge the town with the expense of performing the contract, should depend upon the continued right of the selectmen to go forward with the work. In other words, the plaintiff, making a contract with a public board of

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officers, is bound to know how far the powers of such officers are limited, and in what event they cease and their work is stayed, and to understand that his contract with them will be subject to such limitations and restrictions as the general public statutes of the state impose upon the subject matter.

We do not think that a general petition, like the earliest one in the present case, to discontinue this highway, could have any such effect as to suspend the building of the road. It is, in no sense, connected with the laying of the road, by the selectmen, although it is dependent upon their refusal to discontinue the road. And there is no provision in the statute that such a general petition shall stay the building or opening of the road.

But the petition of the landowners is more in the nature of an appeal from the very act of laying the road. The statute provides, too, that, upon such petition being preferred to the county court, "the opening of the highway shall be stayed until the decision of the county court." This word "opening," as applied to a highway, is no doubt susceptible of some uncertainty in its import. It may refer to the opening of the land to be wrought into a highway, or to the opening of the highway for travel, or it may involve all the acts intervening between the two events referred to above; that is, the entire building of a highway, in popular language, is implied in the opening of the highway. And, in this sense, it might involve the paying of the land damages to those through whose land the highway passed. From the other portions of the same provision, it seems obvious to us that it was the purpose of the statute to suspend all proceedings towards erecting the survey into a highway. This section provides that the county court shall make order for the opening of the road, as in the fifty-sixth section, which seems to imply that the county court, if they establish the road, shall make all the orders anew, both for opening the land and completing the road, the same as in cases originally brought to that court. And the county court are also to make order for the payment of land damages, and to issue execution in default of payment. All which shows very fully that the statute was intended to bring the case, as upon appeal, into the county court, and to suspend all proceedings towards building or opening the road. And

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this, the plaintiff was bound to know might occur, when he made his contract. And, when it did occur, and came to his notice, he was bound to cease his operations.

It would seem that, after this appeal, the selectmen had no more power to charge the town with the continued expense of building the road, than they would have had after the road had been actually discontinued. The effect of the proceedings is evidently intended to be much the same, as to building the road, as ordinary appeals, that is, to vacate the former proceedings in laying the road; so that the laying of the highway, by the selectmen, was, in effect, vacated by the appeal, as really as it was by the final decision accepting the report of the county court commissioners.

We think, therefore, the court were right in restricting the recovery to the work done before the service of the appeal, and notice to the plaintiff.

Whether this recovery should be had upon the order, or the common counts for labor, &c., is not, perhaps, very material.

Judgment affirmed.

FRANCIS A. BIRGE AND EDWARD W. BIRGE v. JACOB
EDGERTON.

Contract. Fraud in law.

Construction of a contract for the sale and delivery by G. & G. G. to the plaintiff, of a quantity of logs, as to the place of delivery, and time when the property would vest in the plaintiff.

The rule recognized and laid down in *Hutchins v. Gilchrist*, (23 Vt. 82,) in reference to the possession and change of possession of logs, upon the land of a third person, applied to the facts in the present case.

TROVER for the conversion of a quantity of logs. Plea, the general issue; trial by jury, March Term, 1855,—PIERPONT, J., presiding.

The taking of the property was admitted; and it was admitted

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that the defendant, as sheriff of Rutland county, took them upon writs of attachment against George and Gardner Griffith, as their property, and that the same were regularly disposed of upon executions subsequently obtained against said Griffiths.

The plaintiffs introduced in evidence, a contract executed by them and George Griffith and Gardner Griffith, which was as follows.

*"Agreement made this twenty-first day of December, 1853, between
 " G. & G. Griffith, of * * * of the first part, and
 " Francis A. and Edward W. Birge, of * * * of
 " the second part*

WITNESSETH:

"That the said party of the first part, for and in consideration
 "of the agreement hereinafter contained, agrees to sell and deliver
 "to the said party of the second part, good sound beech, birch,
 "maple and basswood logs, to be delivered and loaded on the cars
 "of the Western Vermont railroad, at the station in the town of
 "Danby, or the one nearest thereto, by the first day of August,
 "1853, to the amount of three hundred cords. * * *

* [Stipulations as to the size and quality of the logs, &c.] *

* * "And the said party of the second part, in consid-
 "eration of said logs to be delivered as aforesaid, agree to pay
 "to the said party of the first part, the sum of four dollars for
 "each cord so delivered,—payments to be made as follows, viz:
 "Whenever fifty cords are delivered at the side of the said Western
 "Vermont railroad, at Danby, as aforesaid, the said party of the
 "second part will pay to the party of the first part one-fourth
 "part of the price thereof in cash, and for the remaining three-
 "fourths, will give their promissory note, payable at the Farmers'
 "Bank in the city of Troy aforesaid, at six months; and the same
 "for each fifty cords, whenever delivered as aforesaid."

Further testimony was introduced by the plaintiffs, which tended to prove that, in pursuance of said contract, the said Griffiths cut on their own land, and drew and delivered for the plaintiffs, by the side of the Western Vermont railroad, in Danby, 200 cords of the logs, being those mentioned in the declaration; that as often as they so delivered fifty cords, they notified the plaintiffs, and the plaintiffs paid them therefor four dollars per cord, as specified and provided for in said contract; that the place where the

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logs were deposited, was upon the land of Jesse Lapham, adjoining the station or depot grounds of the Western Vermont Railroad Company, in Danby.

The defendant's evidence tended to prove that, after making the said contract, one Seth Griffith, who had a similar contract with the plaintiffs, for the delivery of another quantity of logs, applied, in behalf of himself and the said G. & G. Griffith, to Aaron R. Vail, then a director of the W. Vt. R. Company, residing in Danby, and informed him of said contract with the plaintiffs, and inquired of him what facilities for the delivery and loading of logs the said railroad company would furnish. The convenience and advantage of Lapham's land, for the purpose of depositing and loading the logs, was spoken of, and it was arranged that said Vail should apply to Lapham, to ascertain whether he would consent to have the logs put upon his land; that he did so, and that either said Vail, or the said Seth, in his hearing, informed Lapham that the said Seth, and the said G. & G. Griffith, had contracts for getting out, and delivering, on the railroad, a large quantity of logs for the plaintiffs, to be transported over the W. Vt. railroad, and asked him to consent that they might be put upon his said land, until they were put on the cars, and that upon such application, said Lapham consented.

The court charged the jury, that if they found that the logs were cut and drawn by the said G. & G. Griffith, upon said contract with the plaintiffs, and placed by the side of the railroad, as stated by the witnesses, and that said Griffiths notified the plaintiffs that they had delivered the logs, and the plaintiffs paid said Griffiths the stipulated price for the logs, agreeably to the contract, that the logs thereupon became the property of the plaintiffs; and if they found that said Lapham, at the time the logs were placed upon his land, knew that the logs were left there for the plaintiffs, that the logs were not subject to attachment upon the writ against G. & G. Griffith, and their verdict should be for the plaintiffs to recover the value of the logs. Verdict for the plaintiffs. Exceptions by the defendant.

E. Edgerton and S. H. Hodges for the defendant.

I. By the terms of the contract, the lumber was bought by the

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plaintiffs only when loaded on the cars. Until then it was not their property, nor at their risk, although they paid for it before, for the security of the vendors.

II. The place where the lumber was taken, was provided by the vendors for their own convenience, without any participation on the part of the vendees. It will not be denied that, until the price was paid, the lumber continued in their possession, both because the property was unchanged, and because they had a lien upon it for the price.

The situation of it remained unaltered, and no such substantial and visible change of possession ever took place, as would apprise any other purchaser that it no longer belonged to the Griffiths, or such as has been uniformly required by the decisions of this court, to protect a sale against creditors. 1 Aik. 165; 2 Aik. 67; 2 Vt. 185; 4 Vt. 465; 5 Vt. 235; 6 Vt. 623; 8 Vt. 339, 352; 11 Vt. 683; 12 Vt. 517; 13 Vt. 419; 16 Vt. 329, 419, 579.

III. The vendors were bound to load the lumber on the cars, and it remained in the place provided by them for that purpose; so that no constructive change of possession can be presumed, even though the property had been changed.

C. L. Williams for the plaintiffs.

The opinion of the court was delivered by

ISHAM, J. The question in this case arises, whether the logs, for which this suit is brought, were, at the time of the attachment, the property of G. & G. Griffith, or whether they were owned by the plaintiffs. If they were the property of G. & G. Griffith, the defendant was justified in taking them on the attachments in his hands. The contract under which the plaintiffs claim title to this property was made on the 21st of December, 1853, in which G. & G. Griffith agreed to sell to the plaintiffs, three hundred cords of beech, birch, maple and basswood logs, to be delivered and loaded on the cars of the Western Vermont railroad, at the station in Danby, or the one nearest thereto, by the first of August, 1853. Whenever fifty cords were so delivered, the plaintiffs were to pay them one-fourth of the price in cash, and the remainder by a note at six months, payable at the Farmers' Bank, in the city of

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Troy; and in the same manner for each fifty cords when so delivered. In pursuance of this contract, the Griffiths cut on their own land, and delivered for the plaintiffs by the side of the Western Vermont railroad, in Danby, two hundred cords of logs, they being the same which were taken by the defendant, and as often as fifty cords were delivered, the plaintiffs were notified of it, and the payment was made for them, as provided in the contract. That delivery of the logs was an appropriation of them for the plaintiffs, and as between the parties to the contract, was equivalent to a delivery by the vendors, and the payment of the price was equivalent to an acceptance of their possession by the plaintiffs. In the case of *Dixon v. Yates*, 5 B. & A. 340, it was observed by JUSTICE PARKE, that "the appropriation of a chattel, is equivalent to delivery by the vendor, and the payment of the price is equivalent to the acceptance of possession. The effect of the contract is to vest the property in the vendee." There was nothing further to be done to ascertain the quantity, quality, or value of the property under that contract, and by its terms, the plaintiffs were to receive the logs, at the place where they were deposited. As between the parties to that contract, therefore, we think the plaintiffs have shown a valid title to the logs. The important inquiry in the case, however, arises, whether the plaintiffs have perfected a good title in themselves to that property, as against the creditors of the Griffiths. It is a general principle, that a title to personal property may pass, as between the parties to the contract of sale, and yet be ineffectual as against the creditors of the vendor. To render a sale valid, as against such creditors, the sale must be accompanied by an actual, visible and substantial change of its possession. The use and possession of the property, and its apparent ownership, must not remain with the vendor. This general rule has been too frequently decided in this state to be now called in question, and we feel no disposition to do it. If any difficulty exists, in relation to the authorities on this subject, it has arisen from the application of this principle to doubtful and extreme cases, and not from any doubt that has ever been entertained as to the necessity and soundness of the rule itself.

The logs in question were placed by the side of the railroad, on the land of Jesse Lapham, by his permission and consent, and

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upon the advice and request of Mr. Vail, one of the directors of the railroad. That place was selected, as affording the best facilities for placing the logs on the cars of the road. Mr. Lapham was notified, at the time his consent was given, that the Griffiths had a contract for delivering on the railroad, a large quantity of logs for the plaintiffs, to be transported over the road to them. The same notice was given to Mr. Vail, at the time he rendered his assistance in obtaining this place for their deposit. Both Mr. Lapham and Mr. Vail then knew that, when the logs were deposited in that place, they were left there for the plaintiffs. In the appropriate and emphatic language of the court, in the case of *Hutchins v. Gilchrist*, 23 Vt. 88, "the land where the logs were deposited, became the ware-house of the purchasers." Under such circumstances, the logs cannot be considered as remaining even in the constructive possession of the vendors.

On the question as to the sufficiency of the change of possession of the logs, the case of *Hutchins v. Gilchrist* is a very decisive authority; indeed it is impossible to sustain the attachments made by this defendant, without overruling the authority of that case. In that case, as in this, the sale was of a quantity of logs, lying upon the land of a third person, and placed there with the consent of the owner of the land, given to the vendor of the property. If, in that case, the land could be regarded as the warehouse of the purchaser, much more will it be so considered in this case, where it was by the license of Mr. Lapham, that the logs were deposited there for the plaintiffs, and for the purpose of completing the delivery of them under that contract. The court, in that case, also observed that "it was not necessary to render a sale of logs, under such circumstances, valid, as against the creditors of the vendor, that there should be a change in their situation; and that there might be a change in the possession, while the *site* of the property remained the same." That principle has always been applied to property of this kind, and where, from its cumbrous character, it was impossible or difficult to make a more visible and substantial change of its possession. The rule was so recognized in the case of *Hutchins v. Gilchrist*, in *Sanborn v. Kittredge*, 20 Vt. 639, and in *State v. Barker*, 26 Vt. 650. The same general rule, and a similar application of it, has been sustained in Connecticut and Massachusetts :

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Mills v. Camp, 14 Conn. 219; *Naylor v. Dennie*, 8 Pick. 198; *Tansley v. Zuner*, 29 Com. L. 288.

It was insisted that the provision in the contract, that the logs were to be delivered and loaded on the cars of the railroad, rendered it necessary that they be actually placed on the cars, before the delivery of the property to the plaintiffs was complete, and that until the logs were so placed on the cars, they remained in the possession of the Griffiths. It appears from the case, that it was the understanding of all the parties, that the logs were to lie where they were deposited, by the side of the road, until they were placed on the cars, from time to time, as the plaintiffs should direct. Under these circumstances, we think that placing the logs on the cars had no connection with their delivery to the plaintiffs, nor with the title to them. It is rather to be considered as a contract on the part of the Griffiths, to render that service for the plaintiffs on property belonging to them, the title and possession of which had become perfected and vested in them, not only as against the Griffiths, but also as against their creditors. We think, therefore, that this property was not subject to be attached, as the property of the Griffiths, and that the plaintiffs are entitled to recover.

The judgment of the county court is affirmed.

THE TOWN OF PAWLET v. THE RUTLAND & WASHINGTON
RAILROAD COMPANY.

*Master and servant. Liability of railroad company for acts of
sub-contractors.*

The liability of a master for the acts of his servants grows out of, and is measured by the control of the former over the latter; and for the want of such control the principal will not ordinarily be liable for the acts or neglects of the employees of a sub-contractor under a contractor employed by him to do a specified work.

The defendants contracted with P. & E. to construct certain sections of their rail-

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road; and they sub-contracted with C. to erect certain abutments thereon. A servant of C., in drawing stone for such abutments, left one in the highway, by reason of which one P. was injured, and recovered of the plaintiffs for the damage sustained by him. In an action to recover of the defendants the damages to which the plaintiffs were so subjected, *it was held* that the defendants had no control over the servant of C., and that no privity existed between them; and that the defendants were therefore not liable.

Quære, as to the present authority of *Bush v. Steinman*, 1 B. & P. 404, and the cases founded upon it.

ACTION ON THE CASE to recover the amount the plaintiffs had been compelled to pay on a judgment recovered against them by one Willis Phelps, for an injury sustained by him in consequence of the insufficiency of a highway in the town of Pawlet, and the expenses incurred by the plaintiffs in defending said Phelps' suit; which insufficiency of the highway the plaintiffs alleged was occasioned by the defendants placing and piling in said highway, divers rocks and stones to be used in constructing defendants' railroad, and railroad bridges, and suffering the same to remain there for a long space of time. Plea, the general issue; and trial by the court, March Term, 1855,—PIERPOINT, J., presiding. The Rutland & Washington Railroad Company located their railroad through a portion of the town of Pawlet; said railroad as located, crossed a highway running east and west, and, after crossing said highway, crossed a stream known as Indian River, the north bank of which was some feet south of the highway in said town of Pawlet. The defendants entered into a contract with Messrs. Page & Eastman, to build, construct and complete to running order, all of said railroad lying south of the state line in Poultney, including all that part of the railroad lying in Pawlet; said Page & Eastman entered upon the execution of their contract, and in the prosecution of the work, they let the job of building the abutments for the bridge across said Indian River to one Hiram Chandler. Chandler with his own men commenced and completed the structure of the abutments. The stone used in the construction of the abutments were quarried by the laborers of Chandler, at some distance from the bridge, and drawn by teams over the aforesaid highway, and were deposited, a part on the north, and part on the south side of the river, in convenient positions to be used in building the abutments. In drawing the stone from the quarry to the abutments, one of Chandler's men was hauling a large stone on a wag-

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on, and when on said highway the wagon broke down, and the stone was left lying on the highway. The stone was moved a small distance north from where it fell, so as to remove it further from the traveled path of the highway. It was then left there for about a week or ten days, when said Phelps run his wagon against it, occasioning the injuries for which he recovered his judgment against the town of Pawlet. The spot where the stone fell from the wagon, and where it was left, was not where the stone was intended to be placed for building the abutments, nor was it in the limits of the railroad. There was no other evidence than the facts above stated to connect the defendants with the placing and leaving said stone in said highway, and they insisted that the plaintiffs could not sustain this suit against them; but the court decided otherwise, and held said company liable for placing said stone in the highway as aforesaid. Exceptions by the defendants.

C. L. Williams and J. B. Beaman for the defendants.

E. Edgerton for the plaintiffs.

The plaintiffs' right of recovery is sustained by the cases of *Duxbury v. Vt. Central R. R. Co.* 26 Vt. 751, citing *Newbury v. Conn. & Pass. R. Co.*, not reported; *Lowell v. Boston & Lowell R. Co.*, 23 Pick 31.

The opinion of the court was delivered by

BENNETT, J. The question in this case is important, as a practical one, though not, I apprehend, attended with any intrinsic difficulty. The plaintiffs had been compelled to pay to one Phelps, a sum of money to compensate him for damages sustained by him by reason of the insufficiency of a highway, which the town were bound to keep in repair; and the object of this suit is to recover an indemnity of the railroad company. The defendants had located their road through a part of the town of Pawlet; and they made a contract with Page & Eastman to build, and complete to running order, a section of their road, including that section of it which was located in the town of Pawlet. Messrs. P. & E. undertook a job of building the abutments of a certain bridge in Pawlet to Chandler; and C., with his own men, built the abutments; and the

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obstruction in the highway, which caused the injury to Phelps, was the act of C's. employees in drawing the stone for the abutments; and the question is, can the railroad company be held responsible for the negligence of the employees of C., in leaving the stone, which caused the injury, in the highway?

The general principle is, that a master is liable for the tortious acts of his servant, *which were done in his service*; and this responsibility of the master grows out of, and is measured by his control over his servants; and in fact it begins and ends with it, although there are cases where the rule has been satisfied with a slight degree of actual control over the servant. Without the existence of this essential element of control and direction over the servant, it is difficult to discover any principle which can, in law, make the acts of the servant the acts of the master. Though it may be assumed, in the case before us, that a public nuisance had been committed by the servants of the sub-contractor, and a particular injury had resulted therefrom to Phelps, and for which the town had been compelled to make satisfaction, yet we cannot discover any *privity* existing between the defendants and the employees of the sub-contractor. The contract made, for the building of the abutments to the bridge, was for a lawful purpose, and in no way involved the commission of a wrong, and the employees of the sub-contractor were not the servants of the defendants, or under their control.

There are no particular facts in this case to connect the defendants with the employees of the sub-contractor, and to make them the servants of the defendants, unless it necessarily grows out of the relation which, it may be claimed, exists between the defendants and this sub-contractor. In *Allen v. Hayward*, (7 Queen's Bench, 960,) it was held, that if negligence be committed in the performance of a piece of work, undertaken under a *special contract*, the *contractor is only* liable for the negligence.

So in *Reedie v. North Western Railroad*, 4 Exch. Rep. 244, the rule was laid down, that the owner of fixed property was not liable for the negligent acts of the servants of a contractor, who had agreed with the owner to execute certain works upon the property.

The case of *Knight v. Fox et al.* 5 Exch. Rep. 721 is strongly in point. In that case a railroad company had made a contract with a person to build a section of their road, and this person had

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contracted with another person to build a bridge on that section; and in consequence of the neglect of the employees of the sub-contractor, a third person sustained damage; yet it was held that the contractor was not liable to such person for the negligence of the employees of the sub-contractor. Much less would the railroad company have been liable.

In *Peachy v. Rowland et al.* 16 Eng. Law & Eq. Rep. 442, the defendants had made a contract with an individual to fill in the earth over a drain, which was to be made for them over a highway; and the earth was left by this individual in such a situation as to occasion the injury to the plaintiff; and yet it was held the defendants were not liable for his neglect.

The act which was to be done was a lawful one, and in no way involved the commission of a public nuisance; but it became so, purely from the neglect of the person who had contracted to do the job; and upon this ground, it was held that he *alone* was liable for the damage occasioned to the individual. It was at one time supposed that a distinction might well be taken between the owner of real estate as contradistinguished from the owner of a personal chattel, and that the former was liable on some peculiar ground for injuries resulting from the negligent conduct of any one, in the management of such property; but by the later cases such distinction seems to have been disregarded; and the question has been made to turn upon the ground, whether the person guilty of the negligent act which occasioned the injury, could be regarded as the servant of the person sought to be charged with the payment of the damages.

There may be some cases, however, where the owner of real estate may be made liable for damages done in the management of it, for the want of due care to prevent damage; as in the selection of incompetent persons to do the job. The rule of law, "*Sic utere tuo, et alienum non laedas*," may well apply in such a case.

The case of *Bush v. Steinman*, 1 B. & P. 404, and other English and American cases founded upon that case, must be regarded as much impeached, if not overruled by subsequent cases. Those who wish further to examine this subject may be referred to 6 M. & W. 499; 9 M. & W. 710; 4 Exch. Rep. 244; 12 Adolp. & Ellis, 737; 7 Queen's Bench. 960; 10 M. & W. 109.

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In the case before us, the railroad company had contracted with Page & Eastman to build, and complete to running order, a section of their road, including all that part located in the town of Pawlet; and, in the prosecution of their job, they had let the building of the abutments for the bridge across Indian River, to Hiram Chandler; and the injury was produced by reason of the negligence of the hired men of Chandler, who drew the stone. The case finds, that Chandler and his men completed the abutments; and there was nothing further in the case to connect the railroad company with the negligent act of the hired man of Chandler, which occasioned the injury. The hired men of Chandler were in no way under the control of the railroad company; and they cannot be said to have *impliedly sanctioned the negligence*.

The judgment of the county court is reversed, and the cause remanded.

CHARLES CLEMENT v. THOMAS H. CANFIELD.*Liability of lessee of a railroad.*

The lessee of a railroad is an agent of the railroad corporation, within the meaning of the general railroad act, (Comp. Stat. ch. 26, § 41,) making the corporation and its agents liable for damages occasioned by want of fences and cattle guards.

ACTION ON THE CASE. The declaration set forth the construction, by the Rutland & Washington Railroad Company, of their railroad, and a lease of the same to the defendant; his acceptance of the lease, taking possession of the road, and running cars and engines regularly over the same, and that he thereby became and was liable for all damages which should be done by him, his agents, or the engines running upon said road, through want of cattle guards at the farm crossings of said road, suitable and sufficient to prevent cattle and animals from getting on said railroad: and, that the plaintiff's horse, through the want of such cattle guards, at a farm crossing described, strayed upon the said railroad, and while

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there, was struck by an engine, run upon said railroad under the direction and authority of the defendant, and killed.

Plea, the general issue; trial by jury, March Term, 1855,—PIERPOINT, J., presiding.

The plaintiff introduced in evidence a lease from the Rutland & Washington Railroad Company to the defendant, of their railroad, depots, engines, cars, machinery, tools and all other real and personal property belonging to them, for the term of five years, the defendant paying a stipulated rent therefor, and covenanting to use said railroad and property for the transportation of freight and passengers, &c.,—and testimony tending to prove the other allegations in his declaration; but the only connection which it was attempted to show that the defendant had with the running of the engine by which the plaintiff's horse was struck, was that it was run under his general direction, as lessee, and in pursuance of his lease, the engineers and other hands being employed by him.

The defendant requested the court to charge the jury that the defendant was not, as the lessee of the road, the agent of the R. & W. R. Company, within the meaning of the statute on this subject; but the court declined so to charge, and did charge that the defendant, by reason of running the railroad under his lease, was the agent of the railroad company, and liable for the injury complained of, if the jury found the other parts of the case proved. Verdict for the plaintiff. Exceptions by the defendant.

C. L. Williams for the defendant.

E. Edgerton for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. The only question here is, whether the defendant, being the lessee of the Rutland & Washington railroad, and running the same, under his lease, no cattle guards at a certain farm crossing adjoining the road being made and maintained according to the requirements of the general railroad act, and injury being sustained by the plaintiff through the defect of such cattle guards, is liable for such injury.

The provision of the general railroad law is, that all railroads shall maintain fences and cattle guards, at all farm crossings, for

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the security of the landowners, and "until such fences and cattle guards shall be duly made, the *corporation and its agents* shall be liable for all damages which shall be done by their agents, or engines, if occasioned by the want of such fences and cattle guards."

The question is, whether a lessee can run a railway in defiance of this provision of the general law of the state. If that is so, it certainly shows the statute very defective, and liable to be evaded by a very hollow device. But it does not seem to us there is any difficulty in extending the statute to every one who runs the road, under or by permission of the company, until such fences and cattle guards are erected. The word *agent* is a very extensive term, and may be fairly applied to almost any one who performs the office of another. This lessee, in one sense, certainly, is the agent of the company. He is performing their functions, and clothed with their prerogatives, or he could not be allowed to take tolls, or freight and fare upon the road, or to run engines where he does, probably. In this sense he is the agent of the company. And having, as such agent, acquired the powers and prerogatives of the company, is it anything unreasonable that he should, while exercising such powers and prerogatives, be subjected to the same liabilities which the law imposes upon the company and their agents who destroy property? But it is said that a lessee is not of the class of agents referred to in the statute. That the statute probably refers primarily to those agents of the company who are under their control, like engineers and conductors. But does not the very relation in which the term *agent* is used, in this statute, show that the legislature must have adopted that most extensive term for the very purpose of reaching any and all persons who might acquire the right to run the road, under the powers conferred upon the corporation? Any other construction would seem to be contrary to the fair use of the term *agent*, with reference to the subject matter. I am well aware that a lessee is not the agent of the corporation for all, or for most purposes. But in this sense, inasmuch as they execute these important public functions, under and by virtue of the franchises conferred upon the corporation, they may fairly be regarded as their agents, for the purpose of exposing the corporation to liability for allowing their road to be run before it was properly fenced and guarded, as was held in *Nelson*

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v. *The Vt. & C. R. Co.*, 26 Vt. 717; and equally for the purpose of exposing themselves to liability, under the statute, for running engines upon the road and killing cattle, through defect of cattle guards.

The principle of the case is much the same as in *Barter* vs. *Vermont Central Railroad*, 22 Vt. 365, where the defendants are made liable for the acts of the contractor in claiming right of eminent domain.

And the declaration, alleging that the defendant became and was liable for all damages caused by his running the road, through defect of cattle guards, is well enough. This is the very liability which the statute imposes upon the company, and upon all its agents, who run the road, or assist in doing so, whereby damage accrues. It is true that the statute imposes, primarily, no duty upon any one but the corporation, to build fences and cattle guards: But every one is made liable, who runs the road, by or under the authority of the corporation, for all damages caused through defect of such cattle guards. It was, therefore, the duty of the defendant to see to it, that such cattle guards existed, while he run the road, or to accept the other alternative of the statute, by paying all damages caused through the defect.

Judgment affirmed.

SILAS GREGORY v. REUBEN R. THRALL.

Declaration on jail bond.

A declaration upon a jail bond, given upon an arrest on meane process, is defective and insufficient on demurrer, if it contains no averment that the person arrested was imprisoned in jail at the time of giving the bond.

DEBT on a jail bond. The defendant demurred to the plaintiffs' declaration. The county court, March Term, 1855,—PIERPOINT, J., presiding,—overruled the demurrer, and held the declaration sufficient, to which the defendant excepted.

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The alleged defect in the demurrer sufficiently appears in the opinion of the court.

R. R. Thrall for the defendant.

J. B. Bromley for the plaintiff.

The opinion of the court was delivered by

ISHAM J. Several objections have been taken to this declaration on this demurrer, but our attention has been directed but to one of them, as we are satisfied that, in that particular, the declaration is defective. The action is brought upon a jail bond, given on mesne process, for the admission of one Sylvanus Bidwell to the liberties of the jail yard. The statute, 575, § 21, provides, "that every person imprisoned in jail on mesne process, or on execution, &c., may be admitted to the liberties of the jail yard, first giving a bond to the keeper of the jail in the form prescribed by law." An *actual imprisonment in jail* is necessary, under the statute, before a bond of this kind can be taken or required; and such was the construction of the act in the case of the *U. S. Bank v. Tucker*, 7 Vt. 134. When a person is under an arrest merely, bail to the officer is obtained by the indorsement of their names on the back of the process; and if not so furnished, the officer is directed to commit the person arrested to jail, when a jail bond may be given; Comp. Stat. 248 § 45. This being an official bond, those facts must be stated in the declaration, which authorized the officer to require and take the bond, otherwise the declaration is defective. There is no averment in this declaration, that Mr. Bidwell *was imprisoned in jail*, and that the bond was given in order to obtain the liberties of the yard; nor is there any fact stated, from which such an inference can be drawn. The averment in substance is, that, by virtue of a writ of attachment in favor of the plaintiff, the sheriff arrested the body of Sylvanus Bidwell, and being so arrested, the said Bidwell and the defendant executed the bond on which this suit is brought. It is consistent with this averment that, at the time of the arrest, this bond was required and taken by the officer instead of taking bail by indorsement on the back of the writ. The fact that it was so given must be treated as stated and

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admitted by the demurrer. Under those circumstances, it is sufficient to observe that this bond is not such a security as the statute requires, or which the officer is authorized to take.

The judgment of the county court is reversed, and judgment is rendered for the defendant.

BENJAMIN BARNES v. ELISHA LAPHAM, AND JOSEPH B. LAPHAM ; AMASA BANCROFT AND OTHERS, Trustees.

Effect of confession before justice upon a county court trustee suit.

A confession of judgment before a justice of the peace, in pursuance of § 4 of chap. 115 Comp. Stat., operates as a merger of the original cause of action; and the suit could not, before the act of 1855, (Laws of 1855, p. 13,) thereafter proceed against persons summoned as trustees, even though it was expressly understood that the plaintiff should not be thereby prejudiced in pursuing the trustees.

ASSUMPSIT. The defendants plead the general issue, with notice that they should give in evidence the following special matter, viz: that after the commencement of the suit, and before its entry in the county court, a judgment was rendered by a justice of the peace, in favor of the plaintiff, with his consent, by the confession of the defendants, for the amount of the plaintiff's claim, and the costs then accrued. Trial by the court, March Term, 1855,—PIERPOINT, J., presiding.

Upon the trial it was conceded, that a judgment was confessed by the defendants to the plaintiff, as set forth in the notice, but with the full and express understanding of both parties, before and at the time of said confession, that the said cause would and should be entered in the county court, for the purpose of charging the trustees; and that the plaintiff should in no way be prejudiced or hindered from pursuing and perfecting judgment against said trustees, in said court, in the usual and legal course of proceedings. Upon these facts, the plaintiff insisted that the county court ought to disregard the confession of judgment, and allow the cause to take such course

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as would accomplish the object of the trustee process; but the court rendered judgment for the defendants.

Exceptions by the plaintiff.

S. Green and D. E. Nicholson for the plaintiff.

M. H. Cook and E. Edgerton for the defendants.

The opinion of the court was delivered by

BENNETT, J. We do not see how the plaintiff can get along with his case. The confession of judgment operated as a merger of his original cause of action, which was made the ground of this suit; and the agreement of the parties at the time, that this suit should go on for the purpose of charging the trustees, and perfecting a judgment against them, cannot arrest the merger and neither can the defendants be estopped from using the merger as a defense to the original cause of action.

The statute passed last fall cannot reach this case. This judgment was rendered at the March Term of the county court, 1855; and the exceptions pending, at the time of the passage of the act, were but in the nature of a writ of error, to reverse that judgment.

Judgment affirmed with costs.

BOWEN & MCNAMEE v. ADDISON BUCK AND DAVID WARREN.

Illegal consideration.

A note is void which is given, either wholly or in part, for the purpose of procuring the suppression of a prosecution for an offence of a public nature, involving moral turpitude, and affecting the public morals and example.

A note is also void which is procured by a representation that such a prosecution has been commenced and an agreement to stop it, even if such representation was false if it was believed and acted upon by the opposite party.

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If the pretended prosecution was for obtaining goods by false pretences from the payee of the note, it will make no difference, in this respect, as to its validity, that it was given only for the value of the goods obtained, and for only the amount of the debt justly due therefor from the person who obtained them.

ASSUMPSIT upon a promissory note. Plea, the general issue; trial by jury, March Term, 1855,—PECK, J., presiding.

The plaintiffs produced and gave in evidence the note declared upon, the execution of which was admitted. It appeared that Buck was principal in the note, and Warren, the other defendant, a surety only.

The defendants introduced evidence tending to show that on the occasion when the note was executed, the agent of the plaintiffs in taking the note, represented to the defendants that a criminal prosecution had been instituted in the state of New York against the defendant Buck for obtaining goods of the plaintiffs, for which the note was given, upon false pretences; that a requisition had been obtained from the governor of that state upon the governor of Vermont for his arrest, and that the latter authority had issued the proper warrant for his apprehension and delivery to the custody of the officers of New York; and that he, the agent, had then in his custody the papers necessary for that purpose, and should then arrest the said Buck thereon, and take him to New York, unless the defendants should execute the promissory note above mentioned; and that upon the said agent agreeing that the prosecution in the state of New York should be stopped and discharged the defendants executed the note; and were induced to do so by such representations and promise, and believing such representation to be true and relying on such promise; and that otherwise they should not have executed it. It appeared that the defendant Buck was indebted to the plaintiffs, at the time, to the full amount of the note, and that their agent, in consideration of said note, discharged said indebtedness. There was evidence tending to show that the plaintiffs received from the defendants nothing more than what was justly due them for said debt and lawful costs previously incurred thereon, either in said note or otherwise; and there was also some evidence tending to show that on the occasion of giving the note there was something paid besides the note over and above the debt and costs, for expenses, but that nothing but the debt and legal

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costs was put into the note. The plaintiffs gave evidence tending to show that no criminal prosecution had ever been instituted against said Buck of the nature above mentioned; that their agent who transacted the business and procured the note, did not employ any menaces or representations as above mentioned, and testified to on the part of the defendants; and, that there was no undertaking on his part, that the prosecution above mentioned should be stopped or discharged. There was no evidence that Buck had ever committed the offense charged, except what is above stated.

The plaintiffs requested the court to instruct the jury that in order to sustain the defense the jury must find either that the plaintiffs received of the defendants more than was justly due to them from Buck, in consequence of the threats and representations of their agent, or that there was an actual prosecution pending at the time, and that the note in suit was given upon an agreement to stop or discharge it. They also requested the court to charge the jury that the plaintiffs had a right to stop a prosecution for obtaining goods of them upon false pretences; or at least, that an agreement on their part to stop such a prosecution and settle it upon giving the note would not vitiate it, or render it void, if founded on a good consideration otherwise. The court declined so to charge; but did instruct the jury, among other things, that if they should find that the plaintiffs' agent made such representations as the defendants' evidence tended to prove,—and the defendants executed said note believing such representations to be true, and upon an agreement of the plaintiffs through their agent, that they would cause such criminal prosecution to be stopped and discharged, the note was void, and their verdict should be for the defendants;—but unless they so found, then their verdict should be for the plaintiffs; but if they did so find the defendants were entitled to recover, even though the jury should believe that no offence like that charged had been committed by Buck, and no criminal proceedings had ever been instituted against him for such an offence, and that the plaintiffs received, in said note and otherwise, no more than their due.

To this refusal to charge, and to the charge as given, the plaintiffs excepted; the jury having returned a verdict for the defendants.

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S. H. Hodges for the plaintiffs.

I. The note declared on embraced no more than was due to the plaintiffs, and was founded on a good and sufficient consideration. It is not to be avoided because the agent of the plaintiffs, in order to induce the defendants to execute it, agreed to stop a prosecution which, in fact, had never been instituted.

The crime charged was a mere misdemeanor, in which the public were not concerned. Even in England, where the parties injured are relied on to prosecute, they may settle such offences on receiving amends. The sanction of a court is by no means demanded in all cases. It cannot be had, for instance, where the process of no court has been employed; *Johnson v. Ogilby*, 3 P. Wms. 277; *Draye v. Iberson*, 2 Esp. N. P. C. 643; *Fallowes v. Taylor*, 7 T. R. 475; *Beeley v. Wingfield*, 11 East. 46; *Baker v. Townsend*, 7 Taunt. 422; *Kirk v. Strickwood*, 4 B. & Ad. 421; *Goodell v. Lowndes*, 69 Q. B. 464, (6 Harr. Dig. 3;); *Rex v. Lord Falkland*, Kyd on Awards 64, (6 Ad. & El. N. S. 308;); *Elworthy v. Bird*, 2 Sim. & Stu. 372, (1 Cond. Ch. R. 502;); *Keir v. Leeman*, 6 Ad. & El. N. S. 308; *Crowell v. Gleason*, 1 Fairf. 325, (2 U. S. Dig. 5 4;)

Neither the plaintiffs nor their agent have taken a step to impede the course of public justice.

II. Neither can the note be set aside on the ground that it was obtained by *duress per minas*.

1. Buck was threatened with no proceedings but such as were in the due and ordinary course of law. Of these duress cannot be predicated; to allow it would be to impeach the administration of public justice. There was no attempt to extort anything which was not honestly due from him, or to otherwise abuse legal process; *Dixon v. Olmstead*, 9 Vt. 310; Vin. Ab. "Duress" B. 13, 29, 32 & 25; 2 Inst. 482, there cited; 1 Black Comm. 136, 137; *Williams v. Brown*, 3 B. & P. 68; *Eddy v. Herrin*, 17 Maine 338, (4 U. S. Dig. 68.)

2. Warren, though a surety, can take no advantage of any duress, to which his principal was subjected; Vin. Ab. "Duress" B. 4, 6, 7, 24, 26, 34; Bac. ab. "Duress;" *Huscombe v. Standing*, Cro. Jac. 157; *Thompson v. Lockwood*, 15 Johns. 256.

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W. H. Smith and Roberts & Chittenden for the defendants.

The objection to a recovery upon the note, against either defendant is, that the consideration was, in part, illegal. In such case, the illegality in part avoids the whole; *Deering v. Chapman*, 9 Shepley, 488; *Hinesburgh v. Sumner & al.* 9 Vt. 23. The illegal consideration here was the agreement to compound a criminal prosecution.

No distinction is recognized in this country, (upon this point,) between compounding a felony and a misdemeanor; *Hinesburgh v. Sumner, & al.* 9 Vt. 23; 9 N. H. 197; 6 N. H. 225.

Whether or not Buck had been guilty of the offense pretended is unimportant. The illegality of the consideration, lies in agreeing to stay the prosecution therefor. His guilt, or innocence, could not be determined in an action upon this note; *Dixon v. Olmstead*, 9 Vt. 310.

Again, the plaintiffs are estopped from averring that there was no such prosecution, &c.

The consideration was vicious, upon the representations as made by the plaintiffs' agent. It is not for them to reply. "True, but we make it good, by showing that those representations were false." If they could so reply, there would still be this dilemma. If the plaintiffs' representations were true, the consideration was illegal; if false, the consideration was a deceit and fraud.

The opinion of the court was delivered by

REDFIELD, CH. J. The question in the present case is, whether, the plaintiffs' agent having induced the giving of the note in suit, by representing that a prosecution, for obtaining goods by false pretences, had been instituted in the State of New York, and the proper steps taken to arrest the defendant Buck, in this state, for the purpose of carrying him into New York for trial, and by agreeing to settle and stop the prosecution, the note is collectable, even if, in point of fact, the representations were false.

The plaintiffs' agent having obtained the note by these representations, and the plaintiffs now seeking to enforce the note, implicates the plaintiffs in these transactions of their agent. And having made the representations and induced the defendants to act upon

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them, they would now be estopped from denying them, so that as to both parties probably, as is held in *Dixon v. Olmstead*, 9 Vt. 810, we may now regard as facts all the representations which were made and acted upon, and equally that the defendant is to be treated, as he chose to treat himself, as guilty.

In this view of the facts it is obvious, from the English cases referred to in the argument, and which are thoroughly reviewed in the late case of *Kier v. Leeman*, 6 Ad. & Ellis, N. S. 308, that they are not, perhaps, altogether reconcilable; or the principle, upon which they profess to go, easily to be discovered. But it is certain that the English statutes and the English practice, allow the party aggrieved far more control and agency in wielding criminal prosecutions for his own private advantage than has ever been allowed here. It seems to be supposed there, that in a certain class of inferior misdemeanors, the party aggrieved, and who has a private remedy for the same act, may use the criminal prosecution for the mere purpose of compelling a settlement of the private injury, and when the party is satisfied, the public prosecution is disposed of by a nominal fine. This has always been the English practice as to assaults and batteries, and it is obvious they have extended it to a class of misdemeanors affecting chiefly the interest of private persons, like nuisances; *Baker v. Townsend*, 7 Taunt. 422; *Elworthy v. Bird*, 1 Sim. & Stu. 372; *Beesly v. Wingfield*, 11 East. 46; *Draye v. Iberson*, 2 Esp. C. 643; *Fallowes v. Taylor*, 7 T. R. 475.

But in a class of cases quite numerous in the English books, it seems to have been considered that if the prosecution was one affecting public morals or example, it could not be controlled by a private party, for his own purposes. Of this character are the following: *Pool v. Bousfield*, 1 Camp. 55, which seems to have been a case of paying money to hush a prosecution for perjury in an affidavit; *Edgcomb v. Rodd*, 5 East. 294, was a prosecution for disturbing a religious meeting, and the court held it could not be compromised by the parties mainly affected; *Collins v. Blanton*, 2 Wilson, 341, 349, where it was held that a contract to withdraw a prosecution for perjury is founded on an unlawful consideration, and void; and in the principal case referred to, *Kier v. Leeman*, it was held that the "parties might compromise all offences, though

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made the subject of a criminal prosecution, for which the injured party might sue and recover damages, but that in the present case the offence is not confined to personal injury, but is accompanied with riot and obstruction of a public officer in the execution of his duty. These are matters of public concern, and therefore not legally the subject of a compromise."

This is the latest English case on the subject which has been brought to our notice. The distinction here attempted, if we correctly apprehend the meaning of the learned judge, is between prosecutions for such acts as exclusively affect private persons, and involve no considerable proportion of moral turpitude, or any infamy of punishment, or personal disqualification, or seriously affect the public, that is between assaults and batteries, and nuisances, and offences of this grade, and such as involve the offender in infamous punishment, and personal disability, and extensively concern the public order and well-being. There is another distinction aimed at, but not well defined; it is that the class of crimes which the English law will not allow the injured party to compromise, are those which involve something entirely different from the mere act which constitutes a private injury. As theft, for instance, which always involves a trespass, or embezzlement, which involves a liability for the money or thing embezzled; but beyond all this there is involved a felonious purpose and intent, which constitutes the essence of the crime, and which seriously concerns the administration of public justice.

To apply these distinctions to the present case, it is obvious that the obtaining goods by false pretences, does involve an act for which a private action will lie, as was held by this court in *Poor v. Woodburn*, 25 Vt. 234. It is true, the party selling the goods under the alleged false pretences, is precluded from an action of tort, by insisting upon his securities taken upon the sale and attempting to enforce them, thereby affirming the sale. It is considered that he must, upon the earliest notice of the alleged fraud, abandon his securities and demand the goods, *Kingsford v. Merry*, 34 Eng. R. 607. If so, he may bring trover as in the case last cited, and in *Fitzsimmons v. Joslin*, 21 Vt. 129, but the party cannot hold on upon his contract for the price of the goods, and also sustain an action for the fraud, as the remedies are deemed in-

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consistent; but there is something more than the mere conversion of the party's goods in this offence. There is involved fraud of a very dangerous character to public confidence, and in the punishment of which the public have a deep interest, and which, by the law of most commercial states, is attended, upon conviction, with infamous punishment and personal disability. At common law, this class of frauds was regarded as intimately related to, if not in fact, a part of the *crimen falsi*.

We think, therefore, that by the rules of the English common law, the use made of this prosecution for the public offence, to compel security for the price of the goods, renders the contract void as against the soundest principles of public policy. In regard to this class of offences, with us denominated high crimes and misdemeanors, under the revised statutes, it was long since decided by this court, that prosecutions after the offender was arrested and bound for his trial before the court having jurisdiction to try, must be by the public prosecuting officers; *State Treasurer v. Rice et al.* 11 Vt. 389. The important distinction between the mode of prosecuting offences in England and this country, is there pointed out, and commented upon by Williams, Ch. J., and in this state, there can be no question, we think, that the use made of this public accusation of crime has long been regarded as an abuse of public justice to private and sinister ends, which the law will not allow. The cases of *Sumner v. Hinesburgh*, 9 Vt. 23; and *Dixon v. Olmstead*, id. 310, seem to cover the important question involved in this case, and the case of *Shaw v. Spooner*, 9 N. H. 196, is almost identical with the present, and all these cases stand, as we think, upon ground that is altogether unassailable.

I question, very seriously, whether, in this state, a private person has any right to use any public or private prosecution for crime of any grade, for the purpose of inducing a settlement, security or payment of a private claim for private loss or injury. At all events it must be considered as well settled everywhere, that no such use can be made of a prosecution for a crime of the character here indicated.

The fact, that this note was given for the agreed price of the goods, is certainly not decisive. The party without the use made of the public prosecution, might not have been able to obtain secu-

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rity for that amount, or any part of it. If so, he should not have resorted to this abuse of a public prosecution. It is not duress, but illegality which makes this contract ineffectual. This, of course, may be taken advantage of by all parties in defense.

Judgment affirmed.

THE COMMERCIAL BANK OF ALBANY v. GEORGE W. STRONG.

Sufficiency of proof. Bills of exchange; notice of dishonor.

A decision of the county court, as to the sufficiency of certain proof, *held*, to refer to its character, or quality and competency, and not merely to its quantity or force in convincing the mind.

A notice of the dishonor of a bill of exchange, or promissory note, should be addressed to an endorser at the place of his residence, unless he is shown to have a place of private business elsewhere. The office of a corporation, of which he is an officer, (in this case the president,) in a town different from that in which he resides, will not, in the absence of proof, be regarded as his private business place; and a notice addressed to him there will not be sufficient.

That a notice to an endorser was seasonably deposited in the post office, need not be proved by a single witness. If more persons than one participated in the act, the testimony of all of them should be adduced.

Consideration of the probability as to the manner in which the notice in the present case was directed and sent to the defendant; and of the testimony, in reference to its legal sufficiency, to prove that the notice addressed to the defendant as endorser, was put into the post-office, seasonably to charge him.

ASSUMPSIT against the defendant as an endorser of a bill of exchange, drawn by the Rutland & Washington Railroad Company, by George W. Strong, president, upon, and accepted by the treasurer of that company, dated at the office of the R. & W. R. Co., West Poughkeepsie, and made payable to the order of Eastman & Page, at the American Exchange Bank, New York, endorsed by Eastman & Page, John Bradley, George W. Strong, J. W. Baldwin, and M. Clark. Plea, the general issue; trial by the court, September Term, 1855,—PIERPOINT, J., presiding.

The drawing, acceptance, endorsements, presentment, non-pay-

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ment and protest of the bill were duly proved. The testimony tending to prove notice to the defendant of the non-payment and protest was as follows :

The notary, by whom the bill was protested, deposed that he enclosed to the cashier of the plaintiffs a notice, in due form, to the defendant as endorser. Attached to his deposition were three notices, produced and exhibited to him by the defendant, which the notary testified were filled up in his hand-writing, but he could not testify further as to their identity. One of these notices was addressed, on the inside, to "George W. Strong," and purported to be a notice to him as endorser, and was directed on the outside to "George W. Strong, Esq., West Poultney, Vt.;" another was addressed, on the inside, to "George W. Strong, Pres't Rut. & Wash. R. Co.," and purported to be a notice to him as drawer, and had the word "Rutland" on the lower right hand corner, in writing different from that of the notary ; and the other was addressed on the inside to "Geo. W. Strong, Esq., Pres't &c., and to Geo. W. Strong," and purported to be a notice to him, both as drawer and endorser, and was post-marked with the New York City post-office stamp, and was directed on the outside to "Geo. W. Strong, Esq., Pres't, and Geo. W. Strong, West Poultney, Vt."

William D. Case testified, that during the month of June, 1854, he was a clerk in the Commercial Bank of Albany ; that it was his special duty to make a record, in a book kept for that purpose, of the notices of protests of the non-payment &c., of notes, bills of exchange, &c., received at the bank, and to send said notices to the different persons, whose paper had been protested ; that in the forenoon of the 20th of June, 1854, said bank received by mail, from the city of New York, a notice of the protest for non-payment of the bill of exchange or draft in question, and that enclosed with said notice, were four notices in all respects like it, addressed to George W. Strong, Merritt Clark, James W. Baldwin, and John Bradley ; that on the 20th of June, 1854, in the forenoon, and immediately after the receipt by said bank, of said notice of said protest, he enclosed one of said four notices of protest, which was addressed to George W. Strong, in an envelope, which was addressed by him to "George W. Strong, Rutland, Vermont," whose place of residence was communicated to him by the cashier of said

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bank, on his inquiry for the residence of said Strong, at the time of addressing said letter; that after enclosing said notice in the envelope addressed to said Strong, he laid it on his desk, to be taken and deposited in the post-office in Albany, and afterwards, on that day, the letter was gone from his desk; that it was the daily and special duty of Edwin W. Belden, the youngest clerk, to take all letters from the bank to the post-office, and in his absence it was the duty of James P. White, the next oldest clerk, and in the absence of both, he, said Case, took the letters; that it was his daily and uniform practice to place all his letters, including those enclosing notices of protest, on his desk; that each clerk had his separate desk, and no person, excepting the officers of said bank, could have access to them; that he did not know the residence of said Strong, at the time of enclosing said notice to him, but was informed and directed by the cashier so to direct, and he did so direct it; that the word "Rutland," at the lower right hand corner of the notice, addressed to George W. Strong, Pres't of the Rut. & Wash. R. Co., attached to the deposition of the notary, was made by, and in his (the said Case's) handwriting.

Edwin W. Belden deposed, that on, prior and subsequent to the 20th of June, 1854, he was a clerk in the Commercial Bank of Albany, and that if he took a letter from the desk of William D. Case, on the said 20th of June, 1854, or at any other time, for the purpose of depositing the same in the post-office, at Albany, he did so deposit the same, on the same day on which it was taken for deposit in said office; that it was his duty to take the letters from the said bank to the post-office, and he usually did so, during the month of June, 1854; that he generally took the letters from the bank to the post-office, and had frequently taken letters from the desk of Case, and deposited them in the post-office at Albany; and on his cross-examination he deposed, that he had no recollection of ever taking, or putting into the post-office, a letter addressed to the defendant.

James P. White deposed to substantially the same, in effect, with Belden—that if he took such a letter from the desk of Case, to deposit in the post-office, he did so deposit it on the same day, &c.

The foregoing was all the testimony upon this point, except that it appeared that the residence of the defendant was in Rutland,

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and that the office of the Rutland & Washington Railroad Company was in West Poultney.

The court found the facts proved as stated in the foregoing testimony of the witnesses, but upon that evidence they decided that there was not sufficient proof of notice to the defendant, to charge him as endorser, and rendered judgment in favor of the defendant.

Exceptions by the plaintiffs.

B. F. Langdon and *E. N. Briggs* for the plaintiffs.

Due notice by the plaintiffs to the defendant is proved by the depositions of the notary, Belden and White, and by the testimony of Case, and by the fact that these notices were in the possession of the defendant.

As a general rule, direct testimony is required, but the court will receive any testimony tending to prove the delivery of the letter, containing the notice, to the post-office, in due time.

The facts are before the court, and their sufficiency to prove the notice is a question of law. 4 Camp. 192, *Hetherington v. Kemp*. Chitty on Bills (1842 ed.) 658, and 659 note x. ch. 5 p. 2. Byles on Bills 219. 3 Camp. 379, *Hagedon v. Reed*. 5 Johns. 375-378, *Miller v. Hackley*, note a.

C. L. Williams and *L. C. Kellogg* for the defendant.

Notice to the defendant as endorser should be proved by positive evidence, and not left to inference. Chitty on Bills, 511 and notes 643, 646. *Hawkes v. Salter*, 15 C. L. R. 125. *Toosey v. Williams*, 25 C. L. R. 269. *Bank of Vergennes v. Cameron*, 7 Barb. 143,

The only decision made by the county court, was that there was not sufficient proof of notice. This was a question of fact, and therefore is not revisable in this court. 1 Green. Ev. 61, § 2.

The opinion of the court was delivered by

REDFIELD, CH. J. This is an action upon a bill or draft against the defendant, as endorser. The only question made in the case is in regard to the proof of notice of dishonor to the defendant. The case being tried in the court below, without the intervention of the jury, some question has been made upon the bill

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of exceptions, whether any question of the sufficiency of the evidence of notice, is properly before this court. But as the testimony is detailed very much at length, and the court say they "found the facts proved, as stated in the testimony of the witnesses," and also that, upon the foregoing evidence, which is certified to be all the evidence given upon this point, they decided that "there was not sufficient proof of notice to the defendant, to charge him as endorser," we can only conclude that they did refer to the character and competency of the proof, and not to the quantity; to the quality, rather than the amount and force of the evidence in convincing the mind.

We must, then, see what was the character of the evidence given.

I. We do not think there is any doubt, as to the particular notices sent, either from New York, where the bill was made payable, and where it was protested, or from Albany, where the bill seems first to have been negotiated. It is obvious that the notice, having the New York City post-mark upon it, and which is addressed to the defendant in the double capacity of president of the Rutland & Washington Railroad, on whose behalf he drew the bill, and also as endorser, in his private and personal capacity, was sent by the notary protesting the bill, direct from New York to West Poughkeepsie, where the railroad office seems to have been kept. But as the defendant, at the time, had his residence in Rutland, we do not regard a notice addressed to him at West Poughkeepsie, sufficient to charge him as endorser, there being nothing to show that he had any private business place at West Poughkeepsie. No case of that character has been shown to us, and the general course of decision is, certainly, that notice to an endorser must be sent to the place of his residence, unless he is shown to have his place of business elsewhere. There may be cases where one has different places of business, that notice addressed to either, is sufficient. But although the defendant is not shown here to have any particular place of business in Rutland, distinct from his dwelling, yet, as he had no place of private business out of Rutland, his dwelling was his place of business, to which notice should be addressed to charge him as endorser.

II. We think it is obvious, that the notary having sent this

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double notice direct from New York, would not have probably sent another addressed to the defendant, at the same place, as endorser only. The strong probability is, that he sent two distinct notices to Albany for the defendant, one as drawer, on behalf of the railroad, and the other as endorser only. These being put into each other, and the outside one addressed, upon the back, West Poultney, Case, the teller, doubtless took them to the cashier, in the manner he testifies, and learning the residence of the defendant, marked it upon the inside one, which happens to be the one addressed to the defendant as president, &c. But, most undoubtedly both were sent to Rutland by Case, in the manner testified, as there is no other reasonable mode of accounting for their being in the possession of the defendant, or, indeed, of their being made by the notary, in addition to the double one already sent. The teller, indeed, calls it one notice, and it was so, in some sense, being to one person, but in two quite different capacities. The teller might not have recollected precisely the facts, but it must have been so, to account for his own memorandum upon one of these notices, and also his entry of the notice sent to the defendant, as endorser, upon the notice sent to the Commercial Bank, and produced upon the trial, with the memorandum of the notice sent to Strong, as endorser.

III. The question is reduced, then, to the narrow point, whether there was sufficient evidence that the notice to the defendant, as endorser, which Case testifies he enclosed in an envelope, and addressed to the defendant at Rutland, and which the county court finds to be true, and which there is no reason to question, and which he also says he laid upon his desk, and which was afterwards, on the same day, gone from the desk, was really shown to have been deposited in the post-office at Albany, in season for the mail of the next day. As it was gone from the desk the same day, the only question would seem to be, whether the proof is sufficient to show that it went from the desk directly into the post-office. For if so, that will charge the defendant, although the notice never reached him. After that the conveyance is at his own risk. And if it did not go direct to the post-office, there is no certainty how long it might have been delayed, or indeed whether it ever reached the defendant, except that he had it in possession many months after,

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The cases are undoubtedly very strict upon this point, as they should be, in requiring very great certainty of proof of depositing the notice in the post-office. But the cases, certainly, do not require that this should be proved by a single witness, who can swear positively, that he deposited the notice in the proper place. This, in practice, in large commercial cities, where the vast majority of such cases arise, would seem not generally to be the course of doing such things. The depositing of such letters in the post-office, as of other notices, is, perhaps, more generally done, in such places, by porters and messengers. But it would seem to be the rule, that all who had anything to do about the matter of depositing the notice, should be called. Is this shown to have been done in the present case?

It would seem from the testimony, that this bank had a cashier and three clerks to transact the business. There is nothing to indicate that any other persons had anything to do with sending notices of dishonor of bills and notes generally, or in this case in particular. From the fact that Case was upon the stand, and that the uncertainty of this notice was made a leading point in the trial, we may fairly presume, perhaps, that if there had been others, having probable connection with the transaction, whose testimony was not taken by the plaintiffs, which would very much tend to increase the uncertainty, we should have been apprised of that fact.

From the testimony of Case, it seems, that it was the special duty of Case, the first clerk, to make out and deposit in the post-office, or see that it was done, all such notices. The cashier does not seem to have had any connection with this notice, or to have been expected, ordinarily, to have anything to do with such notices, except probably, to give directions when applied to by Case, as in the present case. It was the daily and special duty of Belden, the youngest clerk, to take all letters from the bank to the post-office, and in his absence the same duty devolved upon White, the next older clerk, and in the absence of both, the duty devolved upon Case. None but the officers of the bank had access to Case's desk. The letter was deposited in the proper place for them to take to the post-office, or where they often took them. They both testify, that at this date, it was their business, in the manner and order

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stated by Case, to carry letters from the bank to the post-office, and that they often took letters from Case's desk for that purpose, and that if they took any letter on that day, or any other, they carried it to the post-office the same day. There is no pretence of any motive, in any officer of the bank, to detain the letter, or that they would be liable to do so by mistake, or indeed that any others but those named, had access, at the time, to the desk of Case, although, it is probable, the directors must have had. But the probability of their carrying off such a letter, by design or mistake, is quite too remote to be taken into the account. It is, perhaps, quite as probable that one of the clerks might have lost it upon the way to the post-office, without being aware of the loss, and really suppose he delivered it at the post-office, and that is not a contingency which is ever taken into the account of uncertainties in such cases.

We may say here, then, safely, that all the persons having any connection with the business of depositing the letters of this bank, at that time, in the post-office, or who would be likely, upon any rational conjecture, either by design or mistake, to take such letter from the desk, have testified explicitly that if they did take it up from the desk, they deposited it in the post-office the same day. In addition to this, the notice is found to have reached the defendant at some time. And we have before said, if the letter had been dropped by mistake, or purloined, it would, in all rational probability, never have reached its destination. Can there be, then, any longer any reasonable doubt of the deposit of this letter in the post-office, the same day it was written? We think not. The evidence rises to a sufficient degree of certainty to answer any demand, even in a criminal court, if it be of the proper quality.

The authorities relied upon to show this was not the case do not seem to us to establish any such proposition.

The proposition in Mr. Chitty's treatise upon bills, that it is incumbent upon the holder "to prove distinctly, and by positive evidence, that due notice was given, and that it cannot be left to inference or presumption," seems to be based altogether upon the case of *Lawson v. Sherwood*, 1 Stark. 314, a mere *nisi prius* decision. The language of the author seems to be taken from the case. But the case seems to justify no such rule of proof, as to cases generally of this kind. The witness there testified that he

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gave notice in either two or three days, three days not being in time, which is no testimony at all of the fact of legal notice. It leaves the probabilities precisely equal, whether notice was given or not, which is precisely no proof at all. Any one who knew nothing about the case, might safely testify that he either did give notice, or did not, which is this case as reported.

And the next proposition of the same author is equally unsupported by the cases referred to. It is that, "the party who puts a letter, giving notice of the dishonor of a bill, into the post office, must be able to swear to a certainty, and not doubtfully, that he put the letter in himself, and not that he was doubtful whether he did not deliver it to another clerk to put it in." The case referred to is *Hawkes v. Salter*, 4 Bing. 715. The difficulty here was, that the witness could not swear whether *he* put the letter in the post office, or another clerk did it, and the testimony of the other clerk was not taken in the case; so that, there was, in fact, no testimony to connect the letter with the office. And the case of *Toosey v. Williams*, 1 Moody & Malkin 128, although more in point for the defendant, as it seems to me, than any other cited, is by LORD TENTERDEN put upon the ground that, after the letter was copied by the clerk, it had to go into the defendants' hands to be sealed, and there was nothing in the case to show that he ever returned it to the clerk whose business it was to convey it to the post office, and who testified very much as the two younger clerks do here. But here the letter is shown, to a moral certainty, to have been taken by the clerks, and they testify, if they took it, they deposited it in the post office the same day. The case of the *Bank of Vergennes v. Cameron*, 7 Barbour 143, a note of which was read to us, seems to be a case where there was no proof of notice, except the notice being in the endorser's hands after the time for giving it had expired. It could not, from that, be inferred, of course, that it was given in time. But, in the present case, it is shown that if the notice was ever deposited in the office, it was done in time, and the notice being in the defendant's hands, is strong confirmation of the notice having reached the office in due time.

On the other hand, the reasoning of Lord Ellenborough, in *Hetherington v. Kemp*, 4 Camp. 193, whose opinions are always regarded as good evidence of the law, shows very fully that the

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evidence in the present case ought to be regarded as sufficient. "Had you called the porter," says his lordship, "and he had said that, although he had no recollection of the letter in question, he invariably carried to the post office all the letters found upon the table, this might have done." "A letter was then put in from the defendant," acknowledging the receipt of a letter of the proper date from the plaintiff, and Lord Ellenborough said he would *presume* this was the letter written to inform him of the dishonor of the bill, although nothing was said of that in the defendant's letter.

The case of *Miller v. Hackley*, 5 John. 374, is a case where far more uncertain evidence than the present was held sufficient.

In this last case, the witness, being the notary who protested the bill, only testified that it was his usual course to send notices by mail, deposited on the evening of the same day of protest, and that he believed he did so in the present case, and it was held sufficient. We think there is no question the proof in the present case should have been held competent to prove notice to the defendant of the dishonor.

Judgment reversed and case remanded.

 THE COMMERCIAL BANK OF ALBANY v. MERRITT CLARK.

Written admission. Evidence.

A written admission by the endorser of a bill or note, that he received due notice of its dishonor, though strong evidence, is not *conclusive* of the fact against him. He may show that the paper was signed under a misapprehension or mistake as to the bill or note referred to, and that no notice of the dishonor was, in point of fact, given.

Such a writing, in the present case, held not to operate either as an admission for the purpose of a trial, as a contract, or as an *estoppel in pais*.

ASSUMPSIT upon a bill of exchange against the defendant as endorser. Plea, the general issue; trial by the court, September Term, 1855,—PIERPOINT, J., presiding.

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The plaintiff introduced the bill of exchange counted upon, with the notarial certificate of protest, together with a writing signed by the defendant, of which the following is a copy, viz:

"COMMERCIAL BANK OF ALBANY v. M. CLARK. *Rutland County Court*, Sept. Term. June 6, 1855. I, Merritt Clark, defendant in the above entitled cause, acknowledge and say that I had legal and due notice by mail of the protest of non-payment of the bill of exchange or draft described in the above entitled cause, and on which I am an endorser, with other endorsers on "same bill."

It appeared that the foregoing admission of the defendant was drawn up by the attorney for the plaintiff, and enclosed to the defendant in a letter, of which the following is a copy,

"M. CLARK, Esq.: *Dear Sir*:—If the enclosed admission is signed by you, it will save cost and trouble of taking testimony in N. Y., to prove notice. If declined, I am going to N. Y. last of next week, and shall issue notice of the time and place, &c., of taking the deposition, to prove notice to you as endorser. * *

"Respectfully yours."

and that, in answer to said letter, the admission was returned, signed by the defendant.

The defendant offered testimony to show that said writing was signed by him under a misapprehension of the facts, and that, at the time he signed it, he had in his mind a different draft from that described in the writ, and that no notice of the protest or non-payment was ever sent to or received by him; and offered to accompany this with proof that immediately upon discovering his mistake, he informed the plaintiff's attorney thereof, both by letter and verbally, and that he should not abide by the concession or admission, and that he withdrew it.

To this testimony the plaintiff objected, on the ground that, whether true or not, the defendant was concluded by his written concession, and could not thereafter show the fact to be different. This objection was sustained by the court, and the testimony excluded. Judgment for the plaintiffs. Exceptions by the defendant.

C. L. Williams and *L. C. Kellogg* for the defendant.

B. F. Langdon and *E. N. Briggs* for the plaintiffs.

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The opinion of the court was delivered by

ISHAM, J. The bill of exchange, on which this action is brought, was duly protested for non-payment. The notice to the defendant, as endorser, of its dishonor, was proved on the trial of the case by his written acknowledgment, in which he admitted that he did receive due and legal notice of the protest and non-payment of the bill. That acknowledgment was full and strong proof that such notice was in fact given to the defendant, and it is not competent for him to avoid or weaken the effect of that admission, by notifying the plaintiffs that he should not abide by that statement, and that he withdrew it. It will always be evidence against him whenever the question arises whether he had notice of the dishonor of that bill. The question in the case now arises, whether that admission is conclusive upon the defendant; or whether it is competent for him, on the trial of the case, to introduce testimony to show that it was made under a misapprehension of facts, and with reference to another bill of a similar character. That testimony, in connection with evidence showing that, in fact, no notice whatever was ever given to the defendant of the dishonor of the bill, was offered and rejected by the court. It is insisted that the testimony offered was inadmissible, as the written admission was made for the *purpose of a trial*, and that it is, for that reason, conclusive upon him. On this question, it is sufficient to observe, that the cases on that subject have no reference to admissions made *out of court*, though they were made with the understanding that they would be used as evidence, on the trial of a particular case. Those admissions only are referred to, which are made by a party, or his attorney, *during the progress of a trial*, and as a substitute for legal evidence. Admissions of that character, as a general rule, will be conclusive, for that trial at least, as they become a part of the record of the trial. The same rule may apply to admissions made out of court, when they are entered, as is sometimes practiced, upon the calendar or records. 2 Phil. Evid. by Cowen, 200; note 192. When the admissions are not of that character, and he is in no way concluded by the records of the case, they are not rendered conclusive upon him, *as being admissions made for the purpose of a trial*. The acknowledgment, in this instance, is not of that character, and does not fall within that class of cases, as they are recognized in this state.

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It is very clear, that the testimony offered by the defendant, is not objectionable as contradicting or in any way affecting a written contract or writing. If this written acknowledgment contained any provisions placing it in the light of a written contract of the parties, the objection would merit a different consideration. But it is not of that character. It has none of the elements of a contract, nor was it designed for one. It is merely an admission that notice had been given, the same as a receipt is an acknowledgment of a settlement in full, or of a receipt of money for a particular purpose; or endorsements upon a note, which are written acknowledgments that so much has been paid. In all these cases, the authorities are uniform, that, if the receipt or the endorsement was made by mistake, and under a misapprehension of facts, though they are evidence against the party, yet, they may be explained, controlled and contradicted by parol evidence, and the mistake of the party corrected, and the truth given in evidence. 1 Aik. 311; 2 Vt. 138; 9 Vt. 41; 5 John. 68; 1 Greenl. Evid. § 305.

There is nothing in the case, as it now stands, that renders that testimony inadmissible, on the ground that the written acknowledgment operates as an *estoppel in pais*. That doctrine applies in cases of fraud, where some act has been done, or statements made, with a fraudulent intent, and with a view to induce a line of conduct which otherwise would not have been taken, and from which advantages have been derived. When the case is destitute of those considerations, there is no ground upon which the application of that doctrine can be made. The doctrine was so held in the case of *Wakefield v. Crossman*, 25 Vt. 301. It was upon that ground the case of *Davis v. Burton*, 4 Car. & P. 166, was decided. The party in that case agreed to admit certain facts on the trial, and for that admission he was not to be held to bail. The admission was held conclusive, as it had induced a line of conduct which would not otherwise have been pursued; for, upon the strength of it, the right to insist upon bail had been surrendered. It was not a mere acknowledgment, but it assumed the character of an agreement or stipulation of the parties, and, therefore, the party was concluded by it. There is no pretence that this admission was made with a fraudulent intent, and from which the defendant has received any advantages. It was an admission against his interest, and designed for the accommodation of the plaintiffs. In the case

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of *Heame v. Rugus*, 9 Barn. & C. 577, BAILEY, J., observed that, "there is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence against him; but we think that he is at liberty to prove that such admissions were mistaken or untrue, and that he is not estopped or concluded by them, unless another person has been induced to alter his condition by them." The case of *Jones v. O'Brien*, 26 Law & Eq. 283, is a direct authority on this subject. The question in that case was, whether notice of a dishonor of a bill had been given, and which was proved by a written promise to pay the bill. The defendant was permitted to introduce evidence showing that no such notice was given. He was not estopped from making that defense, by his promise. It may be true that the testimony offered in this case, as it was in that, may be insufficient to overcome the evidence of the written acknowledgment; but that relates to the credibility of the testimony, not its competency. It is proper evidence to be taken into consideration and weighed by the jury. In Byles on Bills, 350, it is said that, "after a bill is due, a promise to pay it, or an admission of a liability upon it, by a drawer or endorser, will be evidence not only that due notice of its dishonor was given, but that it was duly presented." The same rule applies, whether the promise to pay the bill, or the liability on it, was by parol or in writing. In either case, it is strong evidence of notice against the party making it; but the authorities are decisive upon the question, that it is competent for the party to prove that the promise, or admission, was made under a misapprehension of facts, and that, in fact, no notice of dishonor, was ever given. Story on Bills, § 320, and notes; Chitty on Bills, 535-539. In all these cases, the party is not concluded from introducing that evidence, on the ground that it contradicts any written stipulation, nor as a matter of estoppel.

The judgment of the county court must be reversed, and the case remanded.

 Bank of Rutland v. Cramton.

 THE PRESIDENT, DIRECTORS & CO. OF THE BANK OF RUTLAND v. JOHN W. CRAMTON, *apt.*
Jurisdiction.

A justice has jurisdiction in an action of assumpsit where neither the *ad damnum* or the amount claimed exceeds \$100, though the amount claimed is the balance of an account, upon which an action on book might have been sustained, the debtor side of which exceeds \$100.

ASSUMPSIT brought into the county court by an appeal from the judgment of a justice of the peace. The declaration contained only the common counts, and demanded in damages the sum of one hundred dollars. Plea, the general issue; trial by the court, September Term, 1855,—PIERPOINT, J., presiding.

The plaintiffs introduced evidence tending to prove that on the 15th day of February, 1854, the defendant presented and passed to the plaintiffs a certificate of deposit of seven hundred dollars, and that the plaintiffs, by mistake, paid the defendant the sum of ninety dollars too much on account thereof, which they sought to recover in this action.

It appeared on trial that the plaintiffs charged the defendant on their books with the said sum of ninety dollars, but that the defendant, before the commencement of this suit, refused to pay or account for the same. It also appeared that the defendant, after the above over-payment of ninety dollars, deposited money with the plaintiffs from time to time, and drew out most of it on drafts before this suit was commenced, which was in December, 1854. Of these dealings the plaintiffs kept an account following the charge of ninety dollars, though there was no other connection between them. Of this account the following is a copy:

" 1854.	JOHN W. CRAMTON,	<i>Dr.</i>
February 15, to cash over-paid by mistake,		\$90 00
April 24, paid check,		60 00
May 8, paid check,		281 00
May 18, paid check,		100 00
June 22, paid check,		184 58
		<hr/> \$715 58
1854.		<i>Credit.</i>
March 3, by certificate of deposit,		\$186 97
" 25, " " "		155 28
May 8, cash deposited,		250 00
June 21, cash deposited,		50 00
		<hr/> \$642 25
	Balance due plaintiffs,	<hr/> \$78 33

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It also appeared that there never had been a settlement of any portion of the said dealings between the parties, but that the same remained open and unadjusted, and that there was due from the plaintiffs to the defendant, without reference to the said sum of ninety dollars, the sum of \$16.67, but that there was due the plaintiffs from the defendant, including said ninety dollars, the sum of \$73.33, exclusive of interest. Upon the foregoing facts, the defendant insisted that the said county court had not appellate jurisdiction of said cause, and moved to dismiss the same; but the court refused so to do, and rendered judgment that the plaintiffs recover of the defendant the said sum of \$73.33, and interest thereon. Exceptions by the defendant.

Harrington & Prout for the defendant.

S. H. Hodges for the plaintiffs.

The opinion of the court was delivered by

BENNETT, J. The only question in this case is one of jurisdiction. We have no doubt a justice of the peace had original jurisdiction. The *ad damnum* did not exceed one hundred dollars. With some few exceptions, a justice of the peace has jurisdiction in all civil causes where the debt or other matter in demand does not exceed one hundred dollars. In actions on note and on book, the statute has defined what shall constitute *the matter in demand*, and in the latter case, it is the debtor side of the plaintiffs' book.

Though in the present case the plaintiffs might have recovered their claim in an action on book, yet this action is assumpsit, and it is well settled that, in the general action of assumpsit, the sum demanded in the declaration, that is, the *ad damnum*, is apparently *the matter in demand*, as regulating the jurisdiction of the courts. In *Stevens v. Howe*, 6 Vt. 572, the plaintiff declared in assumpsit in several counts, and in each he declared upon an indebtedness of \$100; and the specifications showed a claim of over \$100, but the credit reduced it under \$100; and it was held that a justice had jurisdiction, the *ad damnum* being \$100.

That case is a full authority for this case.

Judgment affirmed.

Patch et al. v. Keeler et al.

NATHAN W. PATCH AND JANE M. PATCH, HIS WIFE, v. ELIJAH
KEELER AND EBENEZER N. BRIGGS.

*Parol testimony in aid of a general description of premises in
a report of commissioners. Ejectment. Possession.*

When in a written description of a piece of land an uncertainty arises, not from the terms used, but from their application to, or the nature or situation of the subject matter, oral evidence is admissible in explanation of it.

Parol testimony is admissible to show the existence of monuments from and to which commissioners surveyed in setting out a widow's dower, where they have given only a general description of the premises in their return, as, in this instance, "three rows of apple trees on the west side of the orchard."

Considerations involved, and rules to be applied, in determining the eastern line of of premises set out with only the general description of "three rows of apple trees on the west side of the orchard, running north and south in the centre between the third and fourth rows."

One of the defendants having received a deed of the premises east of the three rows of apple trees in question, which was given and held by him only as a mortgage, claimed that his grantor was entitled to hold one of the rows, which he was in possession of as not embraced in, but which the jury found was included in the dower. *Held*, that his claim, in this respect, rendered him liable, equally with his grantor, to an action of ejectment brought for the recovery of the dower premises.

EJECTMENT. The plaintiffs claimed title to the premises in question, as owners of the reversion of that portion of the dower set out to Mary Wood, the widow of Elijah Wood, which were described in the report of the commissioners as follows, "also three rows of apple trees on the west side of the orchard, running north and south in the centre between the third and fourth rows," the said Mary Wood having deceased. The premises claimed to be covered by the above description were described in the declaration by definite courses and distances. The defendants plead the general issue; trial by jury, September Term, 1855,—PIERPOINT, J., presiding.

After introducing copies of the probate records, showing the setting out of a portion of the dower, under the above description, and a division of the reversion, in which said portion was assigned to the plaintiff, Jane M. Patch, and copies of deeds showing the title of the defendants to adjoining premises, and their claim to those in dispute, the plaintiffs, for the purpose of showing that the premises described in the declaration were the same that were set out as a part of Mrs. Wood's dower, as "three rows of apple trees in

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the west part of the orchard," offered testimony tending to show that the commissioners, in setting out the dower, begun and made a monument at a point described and indicated on a plan of the premises, and run from thence on a certain course specified to another point indicated on the plan, and there made a monument on the premises, which was still apparent, to the admission of which the defendants objected, but the court admitted it. It appeared from the testimony introduced in connection with the plan, upon which the situation of all the apple trees was designated, that west of what the plaintiff claimed to be the three rows, there was another row, which the defendants claimed was one of the three rows, consisting of two trees in the orchard and of two more trees in the same line with them, but the last mentioned trees were separated by a fence from all the others, and stood upon land used for a pasture,—the other land being used for meadow and plowing,—and this distinction in the uses made of the different lots existed at the time of setting out Mrs. Wood's dower; but the testimony of the defendants tended to show that Mrs. Wood, during her life, treated this as the west row, and claimed only this one and the two next east. The plaintiffs showed that the defendant Keeler was in possession of the premises, but no possession of the defendant Briggs was shown, or that he claimed any title to the premises, except that he received from the defendant Keeler the deed hereafter mentioned, and caused it to be recorded. This deed was an absolute quit-claim to him of the same land deeded by one Lawrence to Keeler, on the 11th March, 1841, but contained no further description. The deed from Lawrence to Keeler conveyed, by definite bounds, a piece of land embracing the land in question, except that it contained the following reservation, "reserving from the premises above described three west rows of apple trees in the orchard, two stables in the S. W. corner of the barn, and twelve feet square over the stable to put hay on, for the benefit of Mary Wood." The defendant Briggs introduced testimony tending to show that his deed was given to and received and held by him only as a mortgage, and that he claimed no title to any portion of the premises set out to Mrs. Wood as her dower, the same being excepted in the deed from Lawrence to Keeler, to which his deed referred.

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In reference to the several questions presented, the court charged the jury that the plaintiffs were entitled to recover the first three rows of apple trees on the west side of the orchard, and that it was a question for the jury to determine which were the first three rows of apple trees in the orchard, described in the commissioners' report, from what they should find was called and considered to be the orchard, at the time the commissioners set out the dower; that it was for the jury to determine how the east line should be run, except that it should be established centrally between the third and fourth rows; that the defendant Briggs was liable in this action, by receiving the deed from Keeler, if they found the east line as claimed by the plaintiffs, as Briggs, on the trial, had claimed that the dower did not extend as far east as that line.

Under these instructions the jury returned a verdict against both defendants, describing in their verdict, by bounds, the premises which they found the plaintiffs were entitled to recover,—which, upon the east, was a straight line running north and south between what the plaintiffs claimed were the third and fourth rows in the orchard. To the admission of the testimony objected to, and to the charge of the court, the defendants excepted.

Other premises were described in the declaration and included in the verdict, but no question of law being reserved in reference to them, any further allusion to them is deemed unnecessary.

E. N. Briggs for the defendants.

A. A. Nicholson for the plaintiffs.

The opinion of the court was delivered by

REDFIELD, CH. J. This is an action of ejectment to recover the same land set off as dower to Mary Wood, in the estate of her husband. The description in the declaration includes what the defendants claimed was the second, third and fourth rows of apple trees, whereas the dower set off was "the three rows of apple trees on the west side of the orchard." There being two trees in a row west of those claimed by the plaintiffs, in the orchard lot, and two more in the same row, but in a pasture lot, the plaintiffs claimed that those four trees were not to be regarded as one of the rows referred to.

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The first question made in the case is, whether evidence can be given of the survey made, and monuments erected, by the commissioners setting off the dower. It is evident that the uncertainty arises from the state of the subject matter, and not from the terms used in setting out the dower. And it being a latent ambiguity, it may commonly be explained by oral evidence. As it arose from nature of the subject matter, oral evidence is admissible always to ascertain that subject matter. The mere description of three west rows of apple trees is definite, and no uncertainty arises from the terms used, but altogether from the application of the terms to the thing set out. The cardinal object in the construction and application of all instruments being to reach the very thing intended, nothing could be more satisfactory than to find the subject matter of doubt in the application defined and determined by the commissioners themselves. This is in strict accordance with the course of evidence in the application of deeds and other instruments to their subject matter. Where monuments exist, corresponding with the sense of the terms used in a description of land, they will ordinarily govern. The monuments proved in the present case to have been erected by the commissioners, at the time they set out the dower, if established, would be more satisfactory than any merely abstract reasoning on the subject. And these monuments, like all monuments upon land, can only be shown by parol evidence. The law having no fixed definition of what is a row of apple trees, or what is an orchard, the import of the terms "three west rows of apple trees in the orchard," becomes altogether matter of fact for the jury. One tree may not be a row; two trees may be. But where the rows mostly consist of eight, ten, and more trees, it would hardly be expected the commissioners would have regarded two trees as a row, especially where the rest of the row was not in the orchard, of trees in the orchard; but this is all matter of fact. It is impossible to lay down any rule of law upon the subject. But when we come to find monuments, erected by the commissioners, in a line cutting off three full rows, we find no difficulty in saying these monuments are to govern, and so the line run by the jury defines the boundary. The showing of the proceedings of the commissioners, in setting out the dower, is nothing more or different from showing the survey of a lot of land, when it was run out and set off from another lot or township.

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So, too, it was matter of fact, what was the orchard at the time the dower was set off. The law does not define an orchard, and, if it did, it could not determine the extent of this particular orchard. As those three rows of apple trees were to be from the orchard, it must be matter of fact for the jury to determine what was then the orchard, and we do not see how the judge could have given the jury much light upon that point. The rule laid down to the jury, in regard to the other boundaries, that they should be far enough from the trees to include land sufficient for the enjoyment of the trees, is possibly liable to the objection of indefiniteness. But, so are the terms used; and it is the duty of the court and jury to give them a sensible and reasonable application to the subject matter. The rule claimed by the defendants, of half the width between the rows, would be more straight, perhaps, than would consist with comfort and convenience always. And it should not, perhaps, ordinarily extend beyond the amount of ground covered by the trees, or which might be expected to be covered by the probable growth of the trees. And still, as the land may be fairly presumed to have been intended to be included by straight lines, and in a shape approaching rectangular form, it would naturally, at some points, extend further from the trees than at others. The jury seem to have considered all these matters, and, judging from the plan, which is said to define the objects upon the land accurately, we do not see any reason to open the case because all these considerations were not enumerated by the charge. It may probably be treated as in some sense matter of law, when all the facts are put upon paper, as the objects are upon this plan, how the land is to be defined. And it seems to the court that the jury have defined this land, in their verdict, in a manner of which the defendants have no cause to complain. We do not see how any less land could have been taken and include the three rows of trees set out by the commissioners, without adopting some unusual and extraordinary shape. The east line was left to the jury, but this the very report of the commissioners defined as equi-distant from either row of trees, and, of course, it was to be a straight line. We do not see how any question can fairly be made in regard to this line. The jury were told it must be equi-distant from the rows, but not that it should be a straight line. If they had presumed to adopt a curve or zigzag line, as possibly they might have done, under

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the charge, there would have been some difficulty possibly. But this is not left in uncertainty, as the verdict defines it as a straight line.

The charge of the court in regard to the liability of the defendant Briggs, might have been differently expressed, but we do not see how any question can be made in this case, but that if this defendant was in possession of any portion of this farm, he was of this portion, or a part of it, which was recovered by the plaintiffs. Not to spend time upon the exception in the deed to Briggs, which is found by referring to the deed of his grantor only, and which is so expressed as to show that the parties understood the exception probably as terminating with the life of the widow, as the reservation, or exception, is only for her benefit; but, allowing that this exception is as definite as the description in the commissioners' report, which it obviously is not, there was still a controversy as to one of the rows of apple trees, and the defendant Keeler certainly claimed one of the rows, as not included in the exception at all, and so attempted to hold it, as part of the land confessedly deeded to the defendant Briggs. And Keeler's possession, after the deed, is Briggs' possession, unless something arises in the case to show that this possession in Keeler is exclusively on his own account, and without the concurrence of the grantee, nothing of which appears in the present case, but the contrary. We think the claim of Briggs, in regard to Keeler's right to hold this row of trees, might fairly be regarded as a construction of the exception in his own deed from Keeler, as the court decided. Mr. Briggs was not only counsel for Keeler, but for himself also, and we do not think that when he claims possession of one of the rows of apple trees, as not included in the exception, he can fairly refer this exclusively to Keeler, since it does and must enure to his own benefit if it prevails.

Judgment affirmed.

Woodward v. Harlow.

JOHN J. WOODWARD v. JUDSON R. HARLOW.

Account. Book account. Agency. Condition precedent.

If promissory notes go into the hands of a bailiff or receiver under a contract, he may be called to an account respecting them in the common law action of account, and in some cases since the law of 1852, (laws of 1852 p. 9,) in the action on book.

An expressed disapprobation of the acts of one who assumed to act as an agent will not prevent a subsequent ratification and adoption of them.

A recovery may be had for notes which were received by the defendant to be held as security, until the debt of the plaintiff should be settled, if it appear that there is, in fact, nothing due from the plaintiff to the defendant.

If the defendant received them to account for after the payment of costs in a pending suit, the payment of the costs would not be a condition precedent to the plaintiff's right of action.

BOOK ACCOUNT. The plaintiff claimed to recover, among other things, the amount of the notes specified in a receipt executed by the defendant, of which the following is a copy.

"Received of Reuben Marks, five notes against the following persons,—two against Ira Marks, \$ 25.40 and \$ 4.75 ; one against Wesley Nelson, \$ 64.66, also one against Thraderr Stevens, of \$ 22.00, also one against Ira Gibbs, not payable to the bearer, of \$ 20.00, dated March 2, 1853, the same to hold or collect as security, for John J. Woodward's account, due to J. R. Harlow, the same above notes have the interest reckoned up to Sept. 12th, 1853. The said J. R. Harlow is to hold the above notes or money until the said J. J. Woodward's account is settled, and then he is to account to said Woodward for them after cost of suit now pending is paid." And in reference to which the auditor reported the following facts.

In September, 1853, the plaintiff, Woodward, was dangerously sick and bereft of reason, and while in that situation the defendant, Harlow, instituted a suit for the collection of what Woodward might be indebted to him, and on that suit Woodward's property was attached, and Reuben Marks, who was then a partner in business with Woodward, judging it best for Woodward to have his property released from the attachment, without any authority or right so to do, let said Harlow have the notes which were the exclusive property of Woodward, and the same were taken by said Harlow,

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precisely as said receipt imports. At the time of the delivery of of the notes, Woodward was not, in point of fact, in any way indebted to Harlow. Harlow supposed Woodward was indebted to him, and commenced said suit in entire good faith, and the attachment was released in faith of said notes as security.

In the fall of 1853, Woodward having regained a measure of health, and his mental faculties being restored, learned what had been done respecting said notes, and disapproving thereof, demanded of Harlow to deliver back said notes and to settle on account of them. Harlow declined to deliver back the notes, or to settle except according to the terms of the receipt. Woodward never waived any wrong or tort respecting said note transaction, unless the demand, or the claiming an account before the auditor amounted to such waiver.

Harlow had received payment on the note against Nelson, and on the one against Stevens. The other three notes were not paid, but it was conceded by both parties that they were good and collectable.

The auditor reported the amount collected or due on each note; and the county court, September Term, 1855,—PIERPOINT, J., presiding,—rendered judgment upon the report in favor of the plaintiff, allowing the amount collected on the two notes, but disallowing the three notes not collected. To this disallowance the plaintiff excepted.

F. Potter for the plaintiff.

The action of book account has been much extended by the supreme court of this state; *Stone v. Pulsipher*, 16 Vt. 429.

These notes should be made to apply in payment of the defendant's side of the account. They were received by the defendant for that purpose, and he refused to deliver them up, or settle for them in any other way.

Defendant by his conduct and contract, made these notes a matter of account between him and plaintiff. Notes are recoverable on account; *Smith v. Woods*, 3 Vt. 485; 4 Vt. 400; and therefore in book account; statute 1852, page 9.

The claiming these notes on trial before the auditor, is a waiver of the tort, if any tort existed, and was a ratification of the pro-

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ceedings between Marks and the defendant, as set forth in the receipt.

S. H. Hodges for the defendant.

1. The plaintiff can only hold the defendant to an accounting for the notes, by adopting the contract with Marks. This he has always repudiated. His bringing the present action is no affirmation. It is founded on other claims; and is, at most, a mere waiver of the tort; *Hunter v. Prinsep*, 10 East. 378.

2. If he adopts the contract, he must adopt the whole; and is not entitled to call the defendant to an account under it, until he has paid the costs of the former suit; *Dunlaps' Paley on Agency*, 172; *Benedict v. Smith*, 10 Paige. 127; *Smith v. Hodson*, 4 T. R. 211.

3. In an action on book, the plaintiff cannot recover for the notes themselves, which were tortiously taken. He can only have what the defendant has collected upon them; *Peach v. Mills*, 14 Vt. 371; *McOrillis v. Banks*, 19 Vt. 442; *Centre Turnpike Co. v. Smith*, 12 Vt. 212; *Scott v. Lance*, 21 Vt. 507; *Winchell v. Noyes*, 23 Vt. 303.

4. The county court have, in effect, decided that the defendant has not received the money on the notes, and their decision is not open to revision.

The opinion of the court was delivered by

BENNETT, J. The questions arise in this case upon an auditor's report, in an action on book; and the plaintiff claims to be allowed for three certain notes, which went into the defendant's hands upon the terms specified by the auditor, and which had not been collected at the time of the audit, and which were disallowed by the county court. No question is raised, except as to the uncollected notes; and we are to inquire whether, upon the facts reported, an action of account, at common law, would lie to recover the amount of these notes. On the 26th day of September, 1853, the defendant gave to one Reuben Marks his receipt for five notes, including the three in question, to hold the same, or collect, as security for the plaintiff's account, due to the defendant; and it is added in the receipt, that the defendant is to hold the notes or money until the

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plaintiff's account is settled, and then he is to account to the plaintiff for them, after the costs of the suit then pending had been paid. The case shows that when Marks turned out these notes to the defendant, Woodward was not in his right mind, and that he had no authority to do it from Woodward; and it is found that, in point of fact, the plaintiff was not indebted to the defendant. Woodward never was satisfied with the action of Marks, and he demanded the notes of the defendant, and required him to settle on account of them, and this, the report says, the defendant declined to do, except upon the terms of the receipt.

No doubt, when notes go into the hands of a bailiff or receiver under a contract, he may be called to an account, in the common law action; but the defendant insists he was a tort feazor as against the plaintiff, in getting the possession of these notes by the way of Marks.

Suppose it be so, could not the plaintiff affirm the contract made by Marks, on his account, with the defendant? We think he may; and by bringing his action on book, and claiming an allowance for these notes, he has adopted and confirmed the acts of Marks; and it is not for the defendant to insist that the taking and holding the notes was tortious on his part. This form of action can only be maintained on the ground of a ratification. See Story on Agency, Sec. 259. It is of no consequence that the plaintiff at first disapproved of the acts of Marks. This could not have the effect to prevent a subsequent ratification of the acts. His disapproval of the acts of Marks was at any time countermandable, and cannot have the effect by way of estoppel or otherwise, to conclude the plaintiff from a subsequent adoption of the assumed agency.

It is true, as held in *Smith v. Hodson*, 4 Term. 211, that if he adopts a part he must adopt the entire contract. But it is found that nothing was due from the plaintiff to the defendant; and if the defendant had a claim for costs in the action then pending, he might have charged them in his account, and had them adjusted in the present action. The expression in the receipt, that the defendant is to account, "after the costs of suit have been paid," does not make the payment of such costs a condition precedent to the right of bringing an action, but may give to the defendant a right of retainer to an amount equal to such costs.

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Adopting the whole contract then, as expressed in the receipt, we think there is nothing to conclude this action. We think the defendant may well be sued in an action of account as at common law for the notes; and by the statute of 1852, a recovery can be had for those items in the plaintiff's account in the action on book.

The judgment of the county court is reversed, and judgment for the plaintiff, including in the damages the three notes uncollected at the time of the audit and the interest.

BENJAMIN GIDDINGS, *apt.* v. BENJAMIN HADAWAY.

Award. Boundary.

An award defining a boundary will be defeated by proof that there were no such monuments as are referred to in the award, for the purpose of locating the boundary.

But a want of certainty in the award in this respect alone, will not affect another portion of the same award, determining that one party had trespassed upon the land of the other, and awarding to the latter party his damages and costs, though the trespass was upon the same land to which the disputed boundary had reference.

DEBT on an award. Plea, *nil debet*; trial by the court, September Term, 1855,—PIERPOINT, J., presiding.

The plaintiff gave in evidence an agreement of submission, signed by the parties, in the words following:

"Whereas, differences have arisen, and a suit is now pending between Benjamin Giddings and Benjamin Hadaway, both of Poultney, which said differences relate to land lines, between the said Giddings and Hadaway, and to certain trees and timber cut down and taken away by the said Hadaway, from land claimed by Giddings to belong to him, and for the recovery of the value of the said timber and trees, the said suit is now pending in the Rutland county court. Now, then, to the end, and for the purpose of terminating said suit, and all controversy relating thereto, and having

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their land lines settled and determined, and all damages in the premises awarded, the said Benjamin Giddings, and the said Benjamin Hadaway, hereby elect and make choice of Samuel P. Hooker, Joseph Joslin and Joseph Parks, for arbitrators, to hear and fully award in the premises. And the said Benjamin Giddings and Benjamin Hadaway hereby agree to, and with each other to stand to, to abide by, and perform in all things the award that said arbitrators shall make and publish in the premises, and the said arbitrators shall assess, and allow to the party in whose favor they make the award, all the taxable costs in said suit, and the costs and taxable expenses of said arbitration."

The plaintiff also gave in evidence a writing, signed by, and purporting to be the award of said arbitrators, which, after referring to the submission, was in the words following :

"Now know ye that we, the arbitrators in said agreement mentioned, having heard the proofs and allegations of the parties, and examined the matters in controversy by them submitted, do make their award in writing, that is to say, that the east and west line, (which was the only one in controversy,) between the farms of the said Giddings and Hadaway, is a line commencing at the southwest corner of the 'three rod jog,' and thence running east in the north line of the Widow Solomon Giddings' dower, and in the same course, until it reaches the east line of the said Giddings' farm; and that the said Hadaway pay to the said Giddings, twelve dollars and fifty cents; and the costs of said suit, and the costs of said arbitration."

The plaintiff also gave evidence to show that the costs of said suit, at the date of the award, amounted to \$17.65, and that the costs of said award amounted to \$18.94.

The defendant claimed that the whole of said award was void, because it was uncertain, in reference to the location of the line between the farms of the said Giddings and Hadaway, and that by reason of that uncertainty, it did not settle or determine the principal matter submitted, and offered parol evidence to show, that the north line of the Widow Solomon Giddings' dower, mentioned in said award, was unknown and uncertain, and could not be ascertained, and that there was, in fact, no such north line, or monument as referred to in said award; but the court excluded the evidence,

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and held said award to be valid, and rendered judgment for the plaintiff to recover the sums above mentioned.

Exceptions by the defendant.

B. Frisbie and *J. S. Harris* for the defendant.

An award may be reduced to a certainty, by a reference to something outside, as to a written document, or the inspection of some particular house, land, or boundary, but if those referred to are in themselves uncertain, a party can have no remedy except to prove their uncertainty; nor can they be reduced to a certainty without proof. *Cald. on Arb.* 250-1.

Parol proof is admissible to invalidate an award. *Hewitt v. Furman*, 1 Met. & Perk. Dig. 222. 16 S. & R. 135.

J. B. Beaman and *E. Edgerton* for the plaintiff.

This suit is brought to recover the two bills of cost, and the \$12.50 referred to in the award.

All this has no connection with the location of the line between the farms of the parties; and supposing that part of the award relating to this line, to be void, for uncertainty of description, yet the award is valid, as to the subject-matter of this suit, and was decided by this court to be so, at its February session, 1855. An award may be good in part, and bad in part. 3 Phil. Ev. 1027, 1028, 1029 and 1034.

The opinion of the court was delivered by

REDFIELD, CH. J. The evidence offered to show that the monuments referred to in the award, in defining the boundaries between the parties, did not exist, at the time of the award, was, no doubt, competent for the purpose of showing the uncertainty of the instrument; and the fact offered to be shown, which, for the purpose of this trial, is to be regarded as proved, would, no doubt, effectually defeat this portion of the award. For it is only on the supposition that the monuments referred to exist, and may be found, that such award can ever be regarded as sufficiently certain to be binding upon the parties. The evidence offered, therefore, was addressed to a fatal point, in regard to this portion of the award.

The only question, then, is, whether this portion of the award is susceptible of entire separation from the other portion of the

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award. If so, the portion of the award sued upon may be held valid. The submission is of a pending suit for trespass upon lands, and cutting trees. We are justified, no doubt, in regarding it as the very land where the boundary was in dispute. But still the suit for the damages, although upon the land in dispute, had no necessary connection with settling the disputed boundary. The arbitrators must, indeed, decide where the line is, in order to determine the right of the plaintiff to move in the action. And there is nothing to raise any doubt, that the arbitrators did decide, or might have decided the line correctly. The defect in the award, in regard to the line is, not that the arbitrators may not have decided where the line was between the parties, and that correctly, but the defect, if any, upon the proof offered, is, that they have not correctly defined the boundary. There is no want of finality shown in the decision, but a want of certainty in the award.

The award upon the pending action, and giving damages and costs, has no more connection with the award, in regard to the boundary, than an action of trespass for cutting the trees, and an action of ejectment to recover the disputed land; or than separate submissions of the two subjects to the same arbitrators, or to different arbitrators.

The arbitrators, for anything which appears, or can fairly be inferred from the award upon the boundary, may have, and probably did determine the action understandingly, and made no stumble in that portion of the submission, but in defining that portion of the award which refers to the boundary, failed to point out intelligible monuments. The damages and costs had no connection with the boundary. The only thing which could, with any plausibility, be said to be connected with both parts of the award, is the fees of the arbitrators. But in regard to these, as the arbitrators must have determined where the line was, in order to decide the suit referred, and nothing more was to be done to decide the boundaries between the parties, than to define the line, by proper description of existing monuments, it can scarcely be supposed their fees were increased by that portion of the award, which is defective. This is a point not raised in the argument, and not sufficient to create any difficulty in separating the two parts of the award, as we think. Judgment affirmed.

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WILLIAM MANLY AND HOWARD LATHROP v. FRANCIS SLASON.

Debt on a decree in chancery.

An action of debt will not lie upon a decree of the court of chancery which merely adjudges the existence and amount of a lien upon real estate, and provides, in default of its payment otherwise, for an application of the real estate towards its satisfaction.

The decree counted upon in the present case adjudged to be such a decree.

DEBT on a decree of the court of chancery. The declaration counted only upon the ordering or adjudging part of the decree. The defendant plead that the plaintiff ought not to have or maintain his said action, "because the said decree in the plaintiffs' declaration mentioned was as follows," and then proceeded to set forth the entire decree, including the stating or introductory part of it. To this plea the plaintiffs demurred. The county court, September Term, 1855,—PIERPOINT, J., presiding,—adjudged the plea insufficient, and rendered judgment for the plaintiff for the amount decreed to be paid, deducting the appraised value of the land. Exceptions by the defendant.

From the introductory part of the decree it appeared that the plaintiff Manly conveyed to the defendant a certain tract of land, receiving therefor the defendant's notes, which he subsequently pledged to the other plaintiff Lathrop, as collateral security for a debt he was owing him. The land was subsequently conveyed by the defendant to one Ormsbee, who was also a party defendant to the suit in chancery in which the decree was rendered. The orators claimed a lien upon the premises for the amount due upon the notes, there being no mortgage or other writing respecting it. The decree was that the defendants Slason and Ormsbee pay to the orators \$2,219.72, on or before a time stated, and, if they failed to do so, that Manly should hold the premises the same as though his deed of them to Slason had never been made and delivered; with a further provision, in the words following, "and, in case the aforesaid sum of money, with the interest thereon, shall not be paid agreeably to this decree, and the said premises (meaning the premises herein above described,) shall thereby become the property of the said Manly, free and discharged of and from any right accruing from the aforesaid deed of said Manly to said Slason, the same shall be received by the said

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"Manly in full satisfaction of so much of the aforesaid sum, so ordered to be paid, as aforesaid, and of the interest due thereon, as the said premises shall be worth on said third Monday of March, 1850; the value of said premises to be ascertained by three disinterested and judicious persons, to be appointed by the court upon the application of the orators; and in case the orators shall neglect to make application for the appointment of such persons to appraise the value of said premises, for the space of thirty days after the said third Monday of March, 1850, then the said premises are to be received in full satisfaction of the aforesaid sum of money, so ordered to be paid as aforesaid, and of the said several promissory notes executed by said Slason to said Manly, as mentioned in the orators' bill."

The declaration alleged an application for, and an appointment of appraisers, in accordance with the provision for that purpose in the decree, and an appraisal of the premises at the sum of \$1,450; and that the balance of the amount ordered to be paid above the appraised value of the premises had never been paid or satisfied.

S. H. Hodges for the defendant.

An action at law will not lie upon such a decree of foreclosure. It is, in the language of this court, an *alternative* decree; *Thrall v. Waller*, 13 Vt. 231. It is not conclusive as to the amount due from the defendant to the plaintiffs, nor even that anything is due; but only of the sum for which the land is holden. No execution can be had for the costs; much less for the debt. *Binney v. Wetherbee*, 10 Vt. 322. It has been held in every case, sustaining an action at law for a similar deficiency, that the original demand was not merged in the decree, and the original demand has been uniformly declared upon as the sole cause of action. *Lovell v. Leland*, 3 Vt. 581; *Paris v. Hulett*, 26 Vt. 308; *Globe Ins. Co. v. Lansing*, 5 Cow. 380; *Spencer v. Harford*, 4 Wend. 381.

O. L. Williams for the plaintiffs.

Every substantial question here presented, was involved, and seems to have been considered and determined, in the views taken and opinion given, in *Thrall v. Waller*, 13 Vt. 231. The decree was for the payment of a "fixed, liquidated and absolute debt,"

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and "imposed an absolute and conclusive obligation on the defendant," and these are stated, in the above case, to be the only questions in determining whether the action would lie.

The decree here was different from an ordinary foreclosure. The original demands were merged in the sum due, as ascertained and ordered to be paid in this decree; and the premises were to be received at their appraised value, in satisfaction of so much of the sum ascertained and decreed to be paid; which sum existed and was due, *eo nomine et in numero*, only by the decree;—and the balance unsatisfied is represented and exists in no other way except by and under the decree.

The opinion of the court was delivered by

REDFIELD, CH. J. This is an action of debt upon the decree of a court of chancery. It is settled in this state that, upon an absolute decree of a court of chancery, for the payment of money, an action of debt will lie. *Thrall v. Waller*, 13 Vt. 231. The only question in the present case is, whether this decree is of that character.

It is a decree, in a case brought, it would seem from the recitals in the decree, to set up a lien upon certain premises, for the purchase money, in favor of the vendor, alleging also, that it was the understanding of the parties to the conveyance, and of Ormsbee, who subsequently received a deed, in trust, to carry out this understanding, as is alleged, that such lien should exist until the sum due from Slason to Manly should be paid. In the most favorable view of the case for the plaintiffs, it is a bill to foreclose a lien or parol mortgage upon the premises, to secure the payment of Slason's notes to Manly, which had been transferred to Lathrop, before the suit in equity, but whether endorsed or not does not appear. They seem to have been transferred in such effectual mode that no question was made in regard to the title of both plaintiffs to maintain the bill.

The final decree of the court of chancery is, that the defendants Slason and Ormsbee pay or cause to be paid to the clerk of the court of chancery, \$2,219.72, and interest thereon from the 14th day of April, 1849, on or before the third Monday of March, 1850, or in default thereof, that Manly shall hold the premises free from

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all equity of redemption in Slason or Ormsbee, their heirs, &c., and they are decreed to be in satisfaction of the whole debt, unless the orators procured an appraisal of their value, &c. The money was not paid, and the premises were appraised at such a sum as to leave a balance of the decree unpaid, of some \$800, which is here sought to be recovered.

It seems to us that this decree is, in terms, and in legal effect, the same, precisely, as the ordinary decree of foreclosure. The orators in this case, after the time had expired, it would seem, procured a judicial appraisal of the value of the land, so as to determine the price at which it was taken upon the debt. This is, I think, not uncommon in the English practice. It seems to be almost universal there to have a final and formal decree, quieting the title in the mortgagee, after the time limited in the first alternative decree has expired. The ordinary presumption perhaps is, that if the land is taken in this mode, nothing to the contrary appearing, it is in payment of the debt. And where it is of inferior value to the debt, it is no doubt competent to have the value determined by the court, at the time, by proper proceedings. But we are unable to see how this alters the character of the decree. It is still no decree, *in personam*, for the payment of the balance of the debt. That question is not involved in the litigation. The only question then, involved, ordinarily is, whether the debt is a lien upon the land, or rather, whether the sum of money is a lien. For, it may be a lien upon the premises, and not be a personal debt upon any one. It may not have constituted a debt originally, the conveyance being upon condition of the payment of a certain sum, giving the grantee an option whether to pay or not. Or, if a debt is originally created, as in the present case, the obligee, or promisee, may have covenanted not to pursue the debt against the debtor, leaving it a bare lien upon the land; or, it may have become barred by the statute of limitations, and, in either case, it remains a charge upon the land, and may be pursued in the mode this was. And, if any such defense against the debt, as a personal obligation, had existed in this case, or in any other similar, it could not be urged in the proceeding for foreclosing the equity of redemption. And, in such case, as well as the present, the decree will be, or may be, in the usual form. We think, therefore, that

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this is no such decree of a debt, *in personam*, as will enable the orators to sue in debt for the balance of the decree. They must pursue the original debt, whatever it is. This is, in no sense, merged by the proceedings in equity, any further than it is paid by the land. The proceeding in equity is chiefly a proceeding against the land, like any proceeding *in rem*.

Judgment reversed, and judgment that the defendant's plea is sufficient, and that the defendant recover his costs.

SMITH WAIT, *apt.* v. THE EXECUTOR OF JOSEPH H. WAIT.

Statute of frauds. Consideration of deed. Evidence.

A parol promise to pay the debt of another in consideration of property placed by the debtor in the promisor's hands, is not within the statute of frauds. It is an original promise, and binding upon the promisor; and, in this respect, it is immaterial whether the liability of the original debtor continues or is discharged.

The testator in consideration of the conveyance of a farm to him, upon which the plaintiff, at the request of the testator's grantor, had erected a barn, promised to pay the plaintiff the cost of said barn. *Held* that this promise, being made upon a new consideration, was binding, though it was not in writing, and though the original liability of the grantor remained undischarged.

The grantor's deed to the testator was for the expressed consideration of \$8,000, and the testator gave to the grantor a bond and mortgage, providing for his support, and the payment of specified sums to his daughters. *Held* that though the bond might be the only evidence as to the extent of any personal claim in favor of the grantor, yet that it would not prevent the plaintiff from showing the existence of an additional and suppletory agreement by parol, in his own favor, as entering into and constituting a part of the consideration expressed in the deed.

APPEAL from the decision and report of commissioners, disallowing a part of the appellant's claim against the estate of Joseph H. Wait, deceased. The nature of the claim, and the facts in relation thereto, sufficiently appear in the opinion of the court. The county court, September Term, 1855,—PIERPOINT, J., presiding,—rendered judgment in favor of the appellant for the amount of his claim. Exceptions by the appellee.

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D. E. Nicholson and *C. L. Williams* for the appellant.

B. Frisbie and *E. Edgerton* for the appellee.

The opinion of the court was delivered by

ISHAM, J. This is an appeal from the decision of the probate court, disallowing the plaintiff's claim against the estate of Joseph H. Wait. The plaintiff claims the sum of \$140,00 for his expenses in erecting a barn on premises then owned by Joseph Wait. The barn was erected at the request of Joseph Wait, under his assurance that by some arrangement the premises should be conveyed to the plaintiff, so that he should have the benefit of his labor and expenses; or if the premises were conveyed to another, that person should pay the amount expended in erecting the building. In 1847, Joseph Wait conveyed these premises and this barn to Joseph H. Wait, and they now constitute a part of his estate. The fact is found by the auditor, that soon after that conveyance, Joseph H. Wait informed the plaintiff that there was an understanding between him and Joseph Wait, that he was to pay him for building the barn, and that he would do it as soon as he could. This promise the auditor finds was repeated on several occasions down to 1851, and that in their last conversation, the deceased recognized the debt as due from him, and promised to pay it. It is now insisted that this promise to pay the plaintiff his claim is void under the statute of frauds, it not being in writing, and being a promise to pay the debt of another. The payment of this claim due the plaintiff was a part of the consideration for which those premises were conveyed to the deceased, and was made at the request of Joseph Wait, in fulfilment of those assurances which had been given to the plaintiff. That is plainly the finding of the auditor, and the only reasonable construction that can be given to his language throughout his report. Under those circumstances, we think, the authorities are clear that this promise is founded upon a sufficient consideration, and that it is to be regarded as an original and binding contract. There is no doubt that a promise to pay the debt of another, though made at the same time the credit was given to the principal debtor, will be void, under the statute, if not in writing. The same result follows, where such a promise is subsequently made, if the consideration of that promise is the subsis-

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ting liability of the original debtor. The promise in those cases is collateral, and therefore void ; and the promise will be deemed collateral, so long as the liability of the original debtor continues. The cases of *Fish v. Hutchinson*, 2 Wils. 94; *Charter v. Beckett*, 7 Term 201, and *Wain v. Walters*, 5 East 10, are illustrations of that principle. But that principle has no application to cases where the original debtor places property of any kind in the hands of a third person, and that person promises to pay the claim of a particular creditor of the debtor. The promise in such case is an original promise, and the property placed in his hands is its consideration. In this class of cases, it is immaterial whether the liability of the original debtor continues or not. In the case of *Farley v. Cleveland*, 4 Cowen 432, SAVAGE, CH. J. observed that "when there is a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise, the subsisting liability of the original debtor, is no objection to the recovery." In 1 Smith's Lead. cases 329, this subject is examined by the American editor, and from a review of the authorities on this question, he observes that "a promise to pay an antecedent debt, in consideration of property placed in the hands of the promisor by the debtor, has been held not to require a writing to give it validity, and that it seems reasonably well settled, that a verbal promise to be answerable for the antecedent debt of another will be valid, where it is made upon a new and independent consideration, although the debt itself still remain in full force; but that where the consideration grows out of the original contract, the promise will be within the statute." The cases there referred to on this subject are numerous, and fully sustain this principle. The case under consideration clearly falls within the application of that doctrine. The promise by the defendant to pay this debt of the plaintiff is fully found by the auditor; its consideration was not the subsisting liability of Joseph Wait, neither did it arise out of the original contract, but from property placed in the defendant's hands for that purpose by the original debtor. We are satisfied that the promise of the defendant in this case, is to be regarded as an original promise founded upon a new consideration, and legally binding upon him.

On the trial of this case it was insisted that parol evidence was

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inadmissible to show that the payment of this debt was a part of the consideration for which the premises were conveyed by Joseph Wait to the deceased, as it contradicted the deed and bond which is made part of this case. The consideration of the deed is expressed to be for the sum of three thousand dollars. The bond was given to support the grantor and his wife during their lives, and to pay specified sums in money to his three daughters, amounting to the sum of five hundred dollars. As between Joseph Wait and the deceased, it is possible the bond would be evidence of the extent of his claim. The object of the bond was to secure the support of the grantor and his wife, and the payment of certain sums as a family settlement of his estate. It was not intended to cover all the obligations assumed by the grantee. The plaintiff is not a party to the deed or bond. The object of the testimony is not to show a different obligation from that expressed in the bond, nor to vary or affect the legal operation of the deed, but to show that the payment of this debt was a part of the three thousand dollars which is expressed to be the consideration of the deed. The execution of the bond was reducing to writing only a part of the consideration of the deed, and that part only, which was to be rendered to the grantor. In such case, it is competent to prove an additional and suppletory agreement by parol, as that the remaining part of the consideration was to be paid to the plaintiff; *Bowen v. Bell*, 20 John. 341; Greenl. Evid. § 284, a. § 304; *Jeffery v. Walton*, 1 Starkie 267; *Rockwood's case*, 1 Cro. Eliz. 164. We think the testimony was admissible, and that the plaintiff is entitled to recover the amount of his claim.

The judgment of the county court is affirmed, and the case is to be certified to the probate court.

Simonds et als. v. Est. of Powers.

HENRY SIMONDS, SAMUEL D. WINSLOW, AND GEORGE B.
ARMINGTON, *Apts. v.* THE ESTATE OF PETER POWERS.

Homestead.

The homestead of a deceased person is holden and liable for the same debts which it was before his decease. It is not exempted from debts which accrued before its purchase, or before the 1st of December, 1850.

APPEAL from a decree of the court of probate, setting out a homestead to the widow and heirs of Peter Powers, deceased. Trial by the court, September Term, 1855,—PIERPOINT, J., presiding.

The appellants were creditors of the estate of the said Powers. The debt of Henry Simonds, one of the appellants, was contracted prior to the first of December, 1850. The claim of S. D. Winslow consisted of a book account, a part of which was contracted prior to the first of December, 1850, and a part subsequent to that date.

The appellants contended, that as to all the claims contracted, prior to the first of December, 1850, the act authorizing the setting out of a homestead did not apply; and that the probate court should have ordered the executor to provide for the payment of all debts, contracted prior to the first of December, 1850, before setting out the homestead. But the court decided that the act authorized the probate court to set out a homestead, without ordering the payment of debts contracted prior to the first of December, 1850; and affirmed the decree of the probate court.

Exceptions by the appellants.

E. R. Thrall for the appellants.

E. Edgerton for the appellees.

The opinion of the court was delivered by

BENNETT, J. The important question in this case, is in relation to the construction of the fourth section of chapter 65 of the Compiled Statutes. Is it subject to the same exceptions, as to debts contracted *prior* to the first of December, 1850, as the first section of the homestead law, so called? The language of the 4th section

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is general. It, in terms, declares that "if any head of a family shall decease, leaving a widow, his homestead, of the value of \$500, shall wholly pass to his widow and children, if any there be, in due course of descent, without being subject to the payment of the debts of the deceased, unless made specially chargeable thereon, or for taxes assessed thereon." The intention of the legislature is the pole-star in construing a statute, and to effectuate such intention, the language of the legislature may be enlarged or restrained, if necessary, and the construction should be on the whole statute. The first section exempts the homestead from all debts of the deceased contracted after the first day of December, 1850, except, as is afterwards provided in the act. The 6th section of the act provides that such homestead shall be subject to attachment and execution upon any contract that may be made, and for all matters and causes of action which may accrue previous to, or at the time of the purchase of such homestead. It is, then, clear, that under the 6th section, the homestead in the hands of the widow would be subject to all debts which the husband owed at the time he made the purchase; and we think that the words in the 4th section, "without being subject to payment of the debts of the deceased," should be so limited, as to exempt it only from such debts as were made after the 1st of December, 1850, or after the purchase of the homestead by the deceased husband. It can hardly be supposed that the legislature intended to cut off the old creditors of the deceased husband, whose claims existed before the passage of the act, or even before the act went into effect, from going against the homestead, after the death of the husband. It would be as unjust as it would be to have exempted the homestead from all debts, of every description, in the lifetime of the husband, and while in his hands.

We think, then, the decision of the county court should be reversed.

Thrall v. Lincoln.

REUBEN R. THRALL v. DANIEL LINCOLN.

New trial.

A new trial for the alleged reason that a juror had, previous to the trial, formed and expressed an opinion, *refused*; there being but the oath of one witness to the fact against that of the juror; the alleged opinion being upon a matter of law; and it appearing that, if the juror had formed or expressed an opinion, he was not conscious of it at the time of the trial.

PETITION FOR A NEW TRIAL, the ground of the application being that one of the jurors had formed and expressed an opinion respecting the case previous to the trial. The suit in which the trial was had was an action of assumpsit in favor of the petitionee, against the petitioner, counting upon a promissory note. At the time of empanelling the jury, the juror in question was inquired of whether he had formed and expressed an opinion, respecting the cause, and replied that he had not. Upon the trial, after the plaintiff had introduced his note, the defendant, (the present petitioner,) introduced a receipt of a subsequent date apparently cutting off the note. Testimony was then introduced by the plaintiff, tending to prove that the receipt and note were executed at the same time, and the note given upon a settlement, and was justly due; and by the defendant tending to show that the note was not justly due, and that the receipt was expressly designed to cut off the note. The jury returned a verdict for the plaintiff.

A witness, whose affidavit accompanied the petition, testified that he had several conversations with the juror, prior to the trial, respecting the merits of the suit, in which the juror expressed his opinion freely in the case, which was that the plaintiff therein ought to recover, &c. After the service of the petition the deposition of the same witness was taken in behalf of the petitionee, in which he stated that both the juror and himself, at the time of the conversation, were under the impression that the receipt and note both bore the same date; and that he could not swear that the juror stated to him any opinion in relation to the case, except that a receipt bearing the same date would not cut off a note, and if that was Lincoln's case he ought to recover; and that if any other opinion was expressed, it had escaped his recollection.

R. R. Thrall and C. L. Williams for the petitioner.

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Briggs & Nicholson for the petitioners.

By the court, REDFIELD, CH. J. The court are not satisfied that the testimony now adduced in support of the petition for a new trial, shows any such bias upon the mind of the juror, at the time he tried the case, as to operate as a legal disqualification. The testimony of the witness finally amounts to nothing more, than that the juror expressed an opinion as to the effect of a receipt in full, upon a note dated the same day, which was a question of law; and the question did not, in form, arise in the case, the receipt bearing a subsequent date, but seems to have been affected by evidence. Such an expression of opinion might be a good reason, why, in the discretion of the court, a juror should be set aside. But had the juror, upon this same proof, been allowed to sit, it is not certain, by any means, that a new trial should be granted on that account.

1. It is only proved by the oath of one witness against the testimony of the juror, which is no fair balance of proof, the juror being, in fact, as disinterested as the witness, in regard to this question.

2. If we are to believe both persons entirely sincere in their testimony, it shows very clearly that the juror was not conscious of having formed or expressed any opinion. And the consciousness of the fact is the chief ground of disqualification.

3. The opinion was not upon any matter of fact in the case.

Petition dismissed with costs.

Hodges et ux. v. Green.

SILAS H. HODGES AND JULIA HODGES HIS WIFE v. WILLIAM GREEN.

Agency. Pew in a meeting-house. Statute of frauds. Performance of contract for conveyance of real estate.

Held, that the facts and testimony in the present case did not show a case of agency on the part of the defendant.

A pew in a meeting-house is real estate.

A promise to pay a specified price for real estate, conveyed or agreed to be conveyed to the promisor, need not be in writing. If the whole agreement for the conveyance of the real estate, and for the payment of its consideration, be by parol, and there is a conveyance, or a sufficient tender of a conveyance, according to that part of the agreement, an action will lie upon the promise for the agreed price.

If the person to whom the real estate was to be conveyed, and who promises to pay for it, takes possession, and thereafter deprives the other party of all beneficial use or enjoyment of it, he cannot object to the time of the conveyance or of the tender of a conveyance of the legal title, if it was before the commencement of the suit, and he has sustained no injury from its not having been attended to sooner.

ASSUMPSIT for the price of a pew. Plea, the general issue; trial by the court, March Term, 1855,—PIERPOINT, J., presiding.

In August, 1852, the plaintiff Julia Hodges, was the owner of a slip in the Baptist meeting-house in Rutland. The Baptist society, about that time, resolved to repair and remodel their meeting-house, and appointed the defendant to purchase the slips of such persons as were not members of said society. The defendant soon after called on the plaintiff Silas H. Hodges, and told him what the society had resolved to do to the meeting-house, and that he (the defendant) wished to buy the slip, and would give fifteen dollars for it. Said Silas told him he could not give an answer until he had seen his wife. Within a few days, the defendant called again, and said Silas, (having consulted his wife, and she having consented to the sale,) told the defendant they would sell the slip for fifteen dollars; the defendant said he would take it, and it was agreed that a deed of the slip should be executed by the plaintiffs to the defendant. The defendant did not succeed in purchasing many slips, and the society resolved to go on, and remodel the house, without regard to the purchase of the slips, and did proceed; and took out all the old slips; made new slips, and remodeled and so arranged the same, that the identity of the old slips was des-

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troyed. The defendant was one of a committee of three, who were appointed by the society to superintend such repairs and alterations, and took an active part in directing the repairs and alterations as they were being made.

Soon after the last interview, above stated, the defendant called upon said Silas for a deed, who told him he would furnish it in a few days; but within a few days said Silas left town, and was absent most of the time, until the summer of 1853, when he offered to the defendant a deed of the slip duly executed, which the defendant refused to receive, or to pay for the slip. The defendant never claimed any title to the slip, by virtue of any purchase of the same. The whole of the negotiation and contract between the parties was oral, nothing being in writing except the deed offered to the defendant.

Upon the facts, as above set forth, the county court rendered judgment for the defendant, to which the plaintiffs excepted.

S. H. Hodges for the plaintiffs.

The plaintiffs had only a mere easement in the pew. When that was destroyed, their whole estate in the premises was gone, and the defendant obtained all that he had bargained for. A deed afterwards, was a mere nullity, there being nothing to convey. *Kellogg v. Dickinson*, 18 Vt. 266. *Howard v. The First Parish of N. Bridgewater*, 7 Pick. 138. *Voorhees v. The Presbyterian Ch. in Amsterdam*, 8 Barb. Sup. C. 135; (12 U. S. Dig. 457.)

The statute of frauds does not apply to actions brought to recover the consideration money of lands which have been conveyed. Neither does it apply to such actions, where the purchaser has had the full benefit of the contract, and the vendor has no other remedy, as in this case. *Thayer v. Viles*, 23 Vt. 494. *Vimont v. Still*, 6 B. Monroe 474, (8 U. S. Dig. 203.) *Abell v. Douglass*, 4 Denio 305. *Rhodes, Admr. v. Storr*, 7 Ala. 340, (5 U. S. Dig. 69.) *Mayfield v. Wadsleigh*, 3 B. & C. 357.

The contract was, in effect, a license, and the defendant could not be treated as a trespasser *ab initio*.

Harrington & Prout for the defendant.

I. The defendant was acting merely as the agent of the Baptist society. The case shows that the society appointed him agent to

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purchase the slips, and that he informed the plaintiff Silas what the society had resolved to do to the meeting-house, from which the plaintiff must have understood that the defendant was acting in their behalf, and not on his own account.

II. The contract is within the statute of frauds, being for the purchase of lands, or an interest in or concerning them. *Chapman v. Eddy*, 13 Vt. 205; *Kellogg v. Dickinson*, 18 Vt. 266; *Gay v. Baker*, 17 Mass. 435; *Daniel v. Wood*, 1 Pick. 102.

III. The deed was not executed and offered within any reasonable time. *Ballard v. Walker*, 3 Johns. Ch. 60.

The opinion of the court was delivered, at the circuit session in June, by

ISHAM, J. We perceive no objections to the plaintiffs' recovery in this case, on the ground that the defendant, in purchasing the pew, was acting as agent, under a resolution of the Baptist society, to repair and remodel their meeting-house. The defendant did not contract in the name of the society, nor have the plaintiffs any right to call on them for payment of this claim. By the express agreement of these parties, the pew was to be transferred to the defendant, and he personally agreed to pay the stipulated price. The purchase and the responsibility of payment, was assumed by the defendant in his individual capacity. If any legal liability is created by that contract, we think it rests on the defendant. *Simonds v. Heard*, 23 Pick. 125.

A more serious question arises in this case, whether this contract is rendered void by the statute of frauds. The case of *Kellogg v. Dickinson*, 18 Vt. 266, fully establishes the legal rights of the owner of a pew; that he has a property in it which partakes of the character of real estate, and that an action at law can be sustained against any one who unlawfully disturbs him in its possession and use. In the case of *Baptist Church v. Bigelow*, 16 Wend. 28, it was held, that the interest of a party in a pew, is an interest in real estate, and comes within the statute of frauds. The same doctrine is sustained by CH. KENT; 3 Kent's Com. 489. It seems to be well settled by the authorities, that the plaintiffs contract to transfer their pew to the defendant, was one for the sale of some interest in real estate, which the statute requires should be re-

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duced to writing. If the plaintiffs had refused to transfer that pew, to the defendant, in pursuance of their verbal contract, whatever may have been the damages resulting from it, no action at law could be sustained against them. The present action, however, is not of that character. It is not brought upon any contract of the defendant to convey land, or any interest whatever in real estate, but upon a contract to pay a specified sum of money. It is for the consideration money alone for which this action is brought. Upon the question whether that contract is within the statute of frauds, there is a decided conflict between the English and American cases. In the case of *Cocking v. Ward*, 1 Man. Gran. & Scott. 858, it was held, that an agreement to assign a leasehold interest, and to endeavor to procure the landlord to accept a substituted tenant, was an agreement for an interest in real estate, and within the statute of frauds, and that a special declaration in assumpsit could not be sustained for the stipulated consideration, notwithstanding the transfer had been made, and nothing remained to be done but to pay the stipulated price. The same point was determined in the case of *Kelly v. Webster*, 10 Eng. L. & Eq. 517, MAULE, J., observing that "it need not be a contract for the sale of land to be within the statute; if it be a contract relating to the sale of land, it is enough." The doctrine of those cases was afterwards confirmed in the late case of *Smart v. Harding*, 29 Eng. L. & Eq. 252. The principle, however, is recognized in those courts, that if, after a conveyance has been made, the defendant acknowledges his indebtedness upon that matter, a recovery may be had on the general counts, for the sum agreed to be paid. But that fact not appearing in this case, we think that, upon the English authorities, this action cannot be sustained.

In this country, to a great extent, the decisions upon this subject have been otherwise. In the case of *Bowen v. Bell*, 20 Johns. 338, it was held that an action of assumpsit could be sustained to recover the stipulated price, for land which had been transferred, and of which the defendant had taken possession, and that the contract for the payment of the money was not within the statute of frauds. WOODWORTH, J., observed that "it is not a case within the statute of frauds. The contract was perfected by giving the deed. The claim now is to pay the value. The action is not on an contract for the sale of lands, or any interest in lands, although it

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be raised from an agreement concerning an interest in lands. Actions have frequently been brought in our own courts, to recover the consideration for land sold and conveyed." In that case there was no subsequent agreement to pay the price, but the action was founded upon a parol contract, made at the time possession of the property was taken. The same general doctrine was held in the case of *Shepherd v. Little*, 14 Johns. 210. We think it immaterial whether the action be in general or special assumpsit; provided the contract has been executed by the plaintiff, and the defendant's promise is absolute. The law will raise no contract, where, upon the same facts, a special promise would be void, and if general assumpsit can be sustained, then, upon the same facts, an action can be sustained upon a special promise.

In the case of *Wilkinson v. Scott*, 17 Mass. 249, it was held, that an action lies to recover part of the consideration for the conveyance of real estate, which, by mistake, had not been paid. PARKER, CH. J., observed that "it is not a case within the statute of frauds, because it is not a contract for the sale of lands. That contract was executed and finished by the deed. This is only a demand for money arising out of that contract." The same doctrine was held in the case of *Pomeroy v. Winship*, 12 Mass. 523; *Davenport v. Mason*, 15 Mass. 85; *Brackett v. Evans*, 1 Cush. 79; *Preble v. Baldwin*, 6 Cush. 554. In the last case, WILDE, J., observed, "this action is founded on a parol contract, never in any part reduced to writing, but the deed was made in pursuance of that contract, and it is as binding and valid a contract, as if it had been reduced to writing."

In this state the same doctrine has been recognized and sustained. In the case of *Hibbard v. Whitney*, 13 Vt. 21, an action was brought to recover damages for the non-performance of a parol contract to convey lands. The court held that the case was clearly within the statute, and that part performance was a ground only for equitable relief. It was, however, observed, "if this were an action to recover the price of land, agreed to be paid in money, when it was admitted the land had been conveyed, and the only controversy was about the payment of the price in money, or in any other mode, not within the statute of frauds, the action would well lie. The same principle," the court observed, "has been before recognized by this court. In such a case, all that part of the contract,

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which was within the statute of frauds, had been performed by the execution and delivery of the deeds." In the case of *Thayer v. Viles*, 23 Vt. 497, the court observed, that "if this action merely concerns the price of the land, it is not a matter which, by the statute of frauds, is required to be in writing. It has often been decided that an action for the price of land, which has already been conveyed, might be maintained upon merely oral evidence." The same doctrine was again recognized in the late case of *Davis v. Farr*, 26 Vt. 596. Although the rule may be otherwise settled in England, yet we feel no disposition to depart from the construction of that statute, in this particular, which has been given to it in the cases referred to from New York and Massachusetts, and which has been so frequently recognized in this state. We think, therefore, there is no objections to the plaintiffs' recovery, arising from the statute of frauds.

We are satisfied, also, that the case shows a sufficient performance of the contract by the plaintiffs, to entitle them to recover the price of the pew. The deed was offered to the defendant before the commencement of this action, though not until several months after its execution had been requested. The delay of that matter for a season, was in pursuance of a mutual understanding. In the mean time, the defendant took the possession and control of the property, and has entirely destroyed its identity. He has been placed in the same situation, and in the enjoyment of all the rights he would have had, if the deed had been executed. It is not for him, under those circumstances, to refuse to accept the deed, and pay for the property he has taken, particularly as the defendant at no time had repudiated the purchase, in season to enable the plaintiffs to protect their rights; and no pretence was made, that any injury or inconvenience had been sustained, in consequence of that delay. The plaintiffs can sustain no action of trespass for taking and destroying the pew; the contract of sale will prevent that, and, in fact, they have lost their property and are remediless, unless this remedy is open to them. We think the plaintiffs are entitled to recover the stipulated price of the pew.

The judgment of the county court must be reversed, and the case remanded.

Admr. of Crary v. Hall.

NATHAN J. SMITH, *administrator, de bonis non, of* NATHANIEL
CRARY'S *Estate, v.* CALEB HALL.

Ejectment.

The residuary devisee consented to a sale by the executor, for the payment of debts and specific legacies, of a portion of the testator's real estate; and, to save the expense of an order of sale from the probate court, quit-claimed the premises to the executor individually. The defendant being in the adverse possession of a part of the premises, an action of ejectment for the recovery of them was commenced in the name of the estate. The deed to the executor was not recorded, but the defendant, with knowledge of its existence, obtained from the devisee a deed to himself of the premises in dispute, which he put upon record. Between the times of the execution of the two deeds the premises deeded to the executor were, by a decree of the probate court, assigned to the residuary devisee. The executor having deceased, the action of ejectment was prosecuted in the name of the administrator, *de bonis non*, for the benefit of the person to whom the executor had sold. *Held*, that the title derived by the devisee under the will, and the assignment of the probate court, enured to the benefit of the person who purchased of the executor;—that the defendant could not defend the action on the strength of his deed;—and that the action was not defeated by the conveyance to the executor, the defendant being at the time in adverse possession.

EJECTMENT, tried by jury, upon the general issue, September Term, 1855,—PIERPOINT, J., presiding.

The plaintiff gave evidence tending to prove title to the premises described in the declaration, in Nathaniel Crary, (the testator,) at the date of the ouster laid in the declaration, (January, 1845,) and at the time of the said Crary's decease; and that the defendant, at the time laid in the declaration, had entered into the actual possession of the western portion of the same, not definitely marked or designated, and thereafter held it in his adverse possession, claiming title thereto. Crary deceased in July, 1847, leaving a will, which was admitted to probate September 14th, 1847, and John Fox, the executor thereof, commenced the present suit March 24th, 1848. Said Fox deceased during the pendency of the suit, and administration, *de bonis non*, was duly granted to the plaintiff.

The defendant then introduced the will of Crary, by which he devised to Clarissa C. Weller the rest and residue of his estate, after the payment of debts and certain legacies; a decree of the proper probate court, dated November 30th, 1848, assigning all such estate to the said Clarissa C. Weller; and a quit-claim deed of all the premises described in the declaration, executed by the

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said Clarissa to the defendant, dated June 16, 1853, and recorded June 21st, 1853.

The plaintiff then offered to prove that the said John Fox, executor, with the knowledge and consent of the said Clarissa C. Weller, on the 21st of February, 1848, bargained with one Frederick Button, by his bond, to convey to him the home farm of said Crary, and the premises described in the declaration, (the same being a part of said home farm,) for the sum of \$5,950, paid by Button; and had given said Button authority to sue for and recover the premises, so in possession of the defendant, with the damages, in the name of said Fox, executor, but for the benefit of Button, said Button saving the estate and Fox harmless from all costs, expenses and damages; that the purchase money was paid by Button to Fox, executor, and was appropriated by him in paying off the debts chargeable on the estate, and the legacies and expenses of administration, and the balance paid over to the said Clarissa; and that, the said Clarissa, in order to carry out this contract of the executor, and to save the expense of an order of sale from the probate court, on the 24th of February, 1848, conveyed to the said John Fox, by a quit-claim deed of that date, but not recorded until July 14th, 1853, all her right, title and interest to said farm, including the land described in said declaration; and that the defendant, at the time he contracted with and received his deed from Mrs. Weller, knew of the said deed to John Fox, and its contents, and of the contract made with Button.

The court rejected the evidence so offered by the plaintiff, upon the ground of its being immaterial, and directed the jury that, if they believed the evidence introduced, they should return a verdict for the defendant. Exceptions by the plaintiff.

D. Roberts for the plaintiff.

At the date of the writ, (March 24, 1848,) the right to sue was in Fox, the executor. The suit could have been brought in no other name or mode, at that time. Comp. Stat. 341, § 10-11. Was this right defeated by what subsequently occurred?

It was the will of Crary, and not the decree of the probate court, which gave title to Mrs. Weller. Immediately upon his death, an estate in this land vested in her by the will, subject,

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nevertheless, to the lien of the executor, for the payment of debts, legacies and expenses. This estate she could convey by deed. *Hyde v. Barney*, 17 Vt. 280; and she did convey it to John Fox, by deed, February 24, 1848. But the defendant was then in adverse possession of the land; hence, the suit may go on in the name of Fox, executor. *Parkhurst v. Edwards*, 15 Vt. 618.

The decree was rather declaratory than creative of title; merely announcing that she might then take what was hers already by the will. But she had already conveyed to Fox, and is estopped by her covenant in that deed, from setting up any claim under the decree as against her deed; and so the decree has enured to the benefit of Fox. *Edwards v. Roys*, 18 Vt. 473; *Edwards v. Parkhurst*, 21 Vt. 472. But the defendant being in adverse possession, and the effect of the decree being as above stated, the suit may continue on in the name of Fox, executor, and he may recover for the benefit of the equitable owner.

The defendant can claim nothing under his deed from Mrs. Weller. The notice to him was equivalent to a record of her deed to Fox. Mrs. Weller, thereafter, as to all persons having actual or constructive notice of that deed, had no title to convey. The adverse possession of the defendant had only this effect to prevent the transfer of the legal title to Fox. The equitable title was conveyed, and Mrs. Weller's control of the estate gone forever. The defendant could not thereafter, and after notice, for the sake of fortifying his possession, or for any purpose, acquire any right by her deed to him. *Edwards v. Parkhurst*, 21 Vt. 472.

R. R. Thrall and *C. Linsley* for the defendant.

After the payment of all the debts and specific legacies, and the assignment of all the real estate to Clarissa Weller, the residuary legatee, the title to the property was in her; and the suit, though in the name of the administrator, was for her sole benefit, and it was competent for her to sell it, and thereby to discharge the plaintiff's right to recover.

The contract made by the executor, with Button, on the 21st of February, 1848, before he had obtained an order of sale, was void, being against the policy of the law, which required him to be under oath after he had obtained his license to sell it to the best ad-

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vantage, &c. The authority given by Fox to Button, authorising Button to prosecute Hall, in the name of Fox, for Button's benefit, and at his cost, was also against law, a species of champerty or maintenance which should not be encouraged. All the proceedings under that contract were void, as against the policy of the law.

The quit-claim deed executed by Mrs. Weller to John Fox, of the 24th of February, 1848, before the assignment to her by the probate court, conveyed nothing, as she had no title to convey.

The deed from Mrs. Weller to John Fox, of the 24th of February, 1848, while Caleb Hall was in the adverse possession of the land, was void, in any event, so far as that land was concerned. If the deed was void, it was immaterial whether the defendant knew of its existence or not.

The opinion of the court was delivered, at the circuit session in June, by

BENNETT, J. This is an action of ejectment, and the declaration counts upon a seisin and ouster in the life-time of Crary. The premises in dispute are a part of what was called the home farm of Crary; and, at the trial, the defendant attempted to stand upon the title of Crary, as derived from his daughter; and the only question is, which has the best right? For the plaintiff it is to be assumed, upon the exceptions, that Crary had a valid title to the premises; and that the defendant was in possession, adverse to Crary, though upon the trial he did not rely upon his adverse possession.

The defendant, on trial, claimed title under Clarissa C. Weller, the daughter of Mr. Crary.

By the will of her father, Clarissa was made the residuary devisee and legatee; and it seems that for some cause which is not very apparent, the court of probate, on the 30th of November, 1848, passed a decree assigning the whole of the home farm to the daughter Clarissa; and on the 16th day of June, 1853, she gave a quit-claim deed of that part of the home farm now in dispute, to the defendant; supposed to be some twenty-five acres; and this deed was recorded on the 23d day of the same month.

The plaintiff proposed to show that John Fox, then the executor of the will, by the consent of Clarissa on the 21st of February,

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1848, and before the assignment had been made to her, bargained and sold the whole of the home farm of the deceased, to a Mr. Button for nearly six thousand dollars; and that he had paid the price to Fox which he applied to the payment of the debts of the testate, the specific legacies and the expenses of the settlement of the estate; and that he had paid the balance of what remained to Clarissa; and that she, to save expense of getting an order of sale from the probate court, and to carry out the arrangement made between Fox, the executor, and Button, only three days after this arrangement was made, quit-claimed to John Fox all title to every part of the home farm. This deed bears date the 24th of February, 1848, though not recorded until the 14th day of July, 1853; and that the defendant, when he purchased and took his deed from Clarissa of the 25 acres, on the 16th day of June, 1853, had full notice of this deed to Fox. This action is prosecuted by Button, in the name of the administrator, *de bonis non*, for his own benefit, in pursuance of an arrangement between him and Fox, made no doubt on account of the adverse possession set up by the defendant to the 25 acres of the home farm, in the life-time of Mr. Crary.

The whole of this evidence was considered immaterial by the county court as having no effect upon the title set up by the defendant under Clarissa, and was excluded.

We are to inquire whether there was error in this; and also in the court's directing a verdict for the defendant. Under the laws of this state, real estate becomes assets in the hands of the administrator or executor for the payment of debts; and, *sub modo*, passes to them, and their rights are, for the time being, paramount to the rights of the heirs or devisees, though they have but a trust interest; and the statute expressly enacts that no action of ejectment or other action to recover the seizin and possession of any lands, or for any damage done to such lands, shall be maintained by any heir or devisee, until there shall be a decree of the probate court, assigning such lands to such heir or devisee, or the time allowed for paying debts shall have expired, unless the administrator or executor shall voluntarily surrender the possession to the heir or devisee. In the present case, the purposes for which the real estate of the deceased became, *sub modo*, assets in the hands of the executor, had not been answered, in point of fact, and the object of

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the arrangement for a sale to Button was for the payment of the debts, &c. The sale to Button was by the consent of Clarissa, and enured to her benefit; and, to carry out the arrangement, she quit-claimed all her title to the home farm to Fox.

We think it is quite clear that the defendant cannot defend the action upon the strength of his deed from Clarissa. She having consented to the sale, by the executor, to Button, and having, also, confirmed the same by her deed to the executor, she would be concluded from setting up a title in herself, adverse to the rights of Fox, and of Button; and, as the defendant had notice of the deed from Clarissa to the executor, when she conveyed to him, he can stand in no better situation, in this respect, than Clarissa would, and is equally concluded from claiming under that deed. He is chargeable with having acted in bad faith. If Clarissa had gained a legal title to the home farm, by force of the will, and the effect of the assignment of it by the probate court, it would enure to the benefit of Fox, at law, though in trust, by means of estoppel, and, in equity, to the benefit of Button. The question then arises, is the present action defeated by means of the deed from Clarissa to Fox? We think not. As the case shows that the defendant was in adverse possession, at the time of the death of Mr. Crary, and this, we are to presume, was continued up to the time Clarissa deeded to Fox, that deed would not have the effect to convey the legal title to Fox, as against the defendant; and though the defendant did not, upon the trial, insist upon his adverse possession, yet we think it was competent for the plaintiff to prove the adverse possession, in order to show that the action could still be maintained by the representative of the estate of Nathaniel Crary. For the purposes of this hearing, we are to take whatever the testimony tended to prove, as proved, as well as what was offered to be proved.

By our statute, Comp. Stat., chap. 50, § 16, the present administrator has the same power, and may proceed in the same way, in settling the estate, as the executor, Fox, could have done; and, if Fox, the executor, in his life-time, could have maintained this action, it may well be maintained by the administrator, *de bonis non*, though a recovery may enure to the benefit of Button.

Judgment of the county court reversed, and the cause remanded,

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EDWARD L. SARTWELL v. ROLLIN V. R. HORTON.

Arbitration. Recovery of money paid on an unfounded claim.

Parties agreed to submit certain matters of difference to arbitrators who, after hearing and consultation, informed the parties they had agreed, but that neither party was to be bound by their determination, and would be under no obligation to abide by it, and then announced the conclusion to which they had arrived. *Held* that their conclusion was merely advisory, and of no binding force as an award.

Money may be recovered back which is paid in discharge of an alleged claim which is fictitious and false, and known so to be to the party making the claim, and who induces the payment by menaces, duress, or taking an undue advantage of the other party's situation.

ASSUMPSIT. The cause was referred. The principal claim of the plaintiff was for \$ 465.84, in reference to which the referees reported the following facts.

About sixteen years prior to 1853, the plaintiff and defendant entered into an agreement, by which the plaintiff was to take the charge of the defendant's grist-mill, as the miller, and receive one-half of the proceeds or tolls, and the defendant the other half. The plaintiff thereupon took the charge of said mill, and proceeded to discharge the duties of miller, and so continued to do until sometime in February, 1853. Up to this period there was a perfectly good understanding, and no suspicion existed on the part of either that there was anything wrong in the dealings of the other.

In February, 1853, the plaintiff entered into an agreement, by which he was to take charge of a grist-mill in Hydeville, and leave the defendant's mill. After this fact came to the knowledge of the defendant, he professed to have suspicions that the plaintiff had not been dealing honestly with him, and had not given him his just share of the tolls; and that he had taken his (the defendant's) grain without authority, and disposed of, or appropriated it to his own use; and procured a writ in trover to recover the value of the grain so taken or withheld. After having procured said writ he went to the mill where the plaintiff was, and after looking it over, told the plaintiff to get certain notes which the plaintiff had against the defendant, amounting, in all, to between six and seven hundred dollars, and go up to the defendant's house and settle, which the plaintiff did. They went into a room by themselves, and the defendant fastened the door, and then told the plaintiff that he had ascertained

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that the plaintiff had stolen his grain and that of everybody else ; and that he could prove it by various individuals ; and that he had got a county court writ in his pocket against him for it. The plaintiff got up to leave, but the defendant told him he should not. The plaintiff took the notes above referred to, and told the defendant to take what he a had mind to from them. This he declined to do, saying that somebody else must say how much he was to have. The plaintiff was a simple-minded man, and during this interview was alarmed and excited. It was finally proposed by one of them to leave the matter to others to say what should be done in the matter, and N. H. Eddy, Wm. P. Abbott and H. N. Skeels were selected as the persons to whom the subject was to be submitted. This interview was on Saturday. On the Monday following, (being the 28th of February, 1853,) the plaintiff, defendant, and the above named persons, met at the defendant's house. The parties agreed to introduce no testimony ; the plaintiff took no further part in the business of the hearing ; the defendant made a statement, and the arbitrators retired to decide. After they had agreed, they called in the parties and told them that they had agreed, but that neither party were to be bound by their determination, and would be under no obligation to abide by it. The plaintiff said he would hear what they had to say, and then determine. They then stated that they had concluded that the plaintiff ought to pay the defendant the sum of \$465.84. The plaintiff then said he had offered defendant more than that, (referring to his offer to have him take what he pleased from the notes.) The plaintiff then produced his notes, and the defendant figured up the amount, deducted the \$465.84 and paid plaintiff the balance, and took them up.

There was no testimony introduced before the arbitrators, and they had no knowledge that the plaintiff had done any act that had affected injuriously the custom, business or reputation of the mill ; and they all testified that they did not know but the plaintiff was as attentive and faithful to the business of the mill as any other man. They knew that the mill did not do as much business as it had formerly done ; but other mills had been erected in the vicinity ; the business of the place had diminished ; the store there had been broken up,—there was consequently less to call customers there ; the mill was getting old ; and what effect these causes had

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produced upon the business of the mill, the arbitrators could not tell.

The referees further reported that they found that this claim of the defendant had no foundation in fact, and would not have been set up if the plaintiff had not determined to leave the defendant's mill; and they submitted to the court, whether, upon the facts reported, the plaintiff should recover said sum of \$465.84 with the interest thereon.

The county court, September Term, 1855,—PIERPOINT, J., presiding,—rendered judgment for the plaintiff, to recover the balance reported in his favor, together with said sum of \$465.84, and the interest thereon. Exceptions by the defendant.

A. A. Nicholson and *S. H. Hodges* for the defendant.

The award was valid, notwithstanding the opinion expressed by the arbitrators; *Ennos v. Pratt*, 26 Vt. 630.

The referees have found no such misconduct in the arbitrators or the defendant, as should invalidate it at law; *Caldwell on Arbitrations*, 208 &c. (94); *Emerson v. Udall*, 13 Vt. 477; *Howard v. Puffer*, 23 Vt. 365.

Neither can it be inferred from the judgment of the county court, which was, in effect, *pro forma*; *Bartlett v. Churchill*, 24 Vt. 218.

The payment by the plaintiff was a voluntary one, made upon demand, and with full knowledge of all the facts; *Centre Turnpike Co. v. Smith*, 12 Vt. 212 & cas. cited; *Brisbane v. Davis*, 5 Taunt. 144; *Clarke v. Dutcher*, 9 Cow, 674; *Pangburn v. Bull*, 1 Wend. 345.

Briggs & Hyatt for the plaintiff.

There was no consideration for the plaintiff's surrender of his notes, as the referees have found that the defendant's claim had no foundation in fact. His claim was a fraud upon the plaintiff, sought to be enforced by duress and threats; *Farnam v. Brooks*, 9 Pick. 212; *Chitty on Contracts* 193.

The opinion of the court was delivered, at the circuit session in June, by

ISHAM, J. The exceptions in the case are confined to the claim

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of \$465.84, for which a recovery was had on the count for money had and received.

We are satisfied that, in the prosecution of this suit, the plaintiff is not concluded by the matter relied upon as an award of arbitrators. The opinion expressed by them, was given upon the express condition that neither party should be bound by it. It was intended to be, and was, in fact, merely advisory; and as such, it has no binding force. In the case of *Ennos v. Pratt*, 26 Vt. 636, an ordinary submission and award was made, and the arbitrators intended to make a final determination of the matter in controversy. Their opinion in that case that, as their award was not in writing, it was not obligatory, had no effect upon its conclusiveness. It is a different case from this, as in that case they discharged the duties of arbitrators, but in this they refused to act as such.

On the merits of this case, we think that the plaintiff is entitled to recover the money for which this judgment was rendered, as having been paid under circumstances which do not entitle the defendant to retain it. We make no question as to the soundness of the general rule, "that money paid under legal compulsion, or where there is *bona fides*, and money is paid with full knowledge of the facts, though there be no debt, still it cannot be recovered back;" *Marriott v. Hampton*, 7 Term. 269; 2 Smith's Lead. Cas. 335. But if there is a want of good faith in making the claim, and the party is exacting what was not supposed to be a right, and there be duress, or any undue advantage taken of the parties' situation, or if, under the terror of inceptive legal proceedings, fraudulently instituted, money has been paid, the party paying it may recover it back in this form of action; 2 Smith's Lead. Cas. 337; *Pitt v. Oomes*, 2 Ad. & El. 459, 1 Selw. N. P. 89. The referees in this case have found the fact and have stated in their report, that the defendant's claim in relation to grain which the plaintiff was charged with having taken, and also the claim in relation to injuries to the grist mill, had no foundation, in fact, and would not have been set up, if the plaintiff had not determined to leave the defendant's employment. This must be regarded as a distinct finding, that the claim was false, and known to be such by the parties when it was made, and when this amount was deducted from the plaintiff's notes. That fact alone brings this case within the prin-

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ciple decided in the case of *The Duke of Cadaval v. Collins*, 4 Ad. & Ell. 858. That was an action to recover money paid to the defendant after the plaintiff had been served with process. The fact was found by the jury, that the defendant knew that he had no claim upon the plaintiff when he sued out his writ. COLERIDGE, J., observed that "no case has decided that when a fraudulent use has been made of legal process, both parties knowing throughout that the money claimed was not due, the party paying under such process is not to have the assistance of the law." PATTERSON, J., observed that "the jury concluded that the defendant knew that the debt did not exist, and that he used the process colorably. To say that money obtained by such extortion cannot be recovered back would be monstrous." From the mere fact that the party knew that he had no just claim, the court declared the suit to have been fraudulently commenced, and the money obtained by extortion. In *Colwell v. Pedan*, 3 Watts 327 it was held that a distinction existed between those cases where a legal remedy has been used as an instrument of extortion, and those in which it has been used *bona fide*, to enforce what was supposed to be a right. In all the cases where a recovery was allowed, good faith existed in making the claim; the party supposed he had a right. But in this case, that fact is expressly negatived by the finding of the referees. Payments made under such circumstances, are not those voluntary payments which preclude the party from legal redress. The application of that principle is made to cases where the party is acting in good faith, and the money is taken on a supposed right.

There are other circumstances in the case which give additional weight to the plaintiff's right to recover this money. The transaction at the defendant's house, when the claim was first made, and the plaintiff was forbidden to leave the room, falls but little short of actual violence. The plaintiff, the referees state, is a simple-minded man, and on that occasion became excited and alarmed; so much so, as to induce him to offer the defendant his notes, with liberty to take such sum from them as he saw fit. It will hardly be contended that if money had then been paid, or this amount had then been deducted from the notes, but that the plaintiff would be entitled to legal redress; and it would seem that the plaintiff, by

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refusing then to take it, and requiring that others should state the sum which should be paid to him, was conscious of that result.

But it is insisted that as that transaction took place on Saturday, and the money was not paid until the next Monday, that the case is relieved from those considerations. But we think that conclusion does not follow. A similar delay existed in the case from 4 Adol. & Ell. 858, but it had no effect against the fact that the money was exacted and paid on a claim which the party knew had no existence in fact. It is also to be observed that in that case, the money was not paid until the next day after the party paying it had been discharged from arrest; so that in that case as well as in this, the money was paid, not under an actual arrest, but under the apprehension and fear of one. If, in that case, the money could be recovered back, when, in his negotiations, the party paying the money was assisted by friends and professional advice, it surely should be recovered in this, where the case is destitute of any such considerations.

It is impossible to see upon what just ground the opinion of the persons named as arbitrators was given. Their own testimony in this case shows that they could not have been influenced by any proper considerations involved in the case. In any event, that proceeding will not make a claim where none existed before, or render it proper for the defendant to retain the money when it could not be retained independent of that transaction. If the fact that the defendant supposed that he had a just claim had not been expressly negatived, there would have been much more difficulty in permitting the plaintiff to recover. But that fact is negatived in the case. There is no propriety, therefore, in saying that a claim was created under that fraudulent use of legal process, the personal duress of the plaintiff, or by the very exceptionable proceeding before the persons named as arbitrators. That matter, so far from alleviating the facts in the case, only aggravates the circumstances under which that amount was taken from the plaintiff. It can be regarded in no other light than as an attempt to give to a transaction fraudulently conceived, and fraudulently prosecuted, the form of a legal proceeding.

The judgment of the county court is affirmed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF BENNINGTON,
AT THE
FEBRUARY TERM;
AND AT THE
CIRCUIT SESSION, IN JUNE, 1856.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

LAUREL B. ARMSTRONG, *admr. upon the estate of* JULIUS K.
SHELDON *v.* DANIEL B. GRISWOLD.

Deposition. Testimony of party.

A deposition taken without notice before the passage of the act entitled "an act in relation to depositions," approved November 14, 1854, (Laws of 1854, p. 5,) held admissible after the law took effect, without having been filed thirty days previous to the session of the court at which it was offered.

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The witness law of 1852 (Laws of 1852, p. 11,) contemplated the examination of a party as a witness only in open court, and did not authorize the using of his deposition. (But see Laws of 1855, p. 12.)

ACTION ON THE CASE, tried at the June Term, 1855,—PIERCEPOINT, J., presiding.

During the trial, the plaintiff offered in evidence a deposition of William E. Sheldon, which was taken without notice to the defendant, in February, 1853, but was not opened or filed in the clerk's office until the day of trial; also a deposition of Julius K. Sheldon, the original plaintiff in this action, which was taken in March, and filed in the clerk's office on the 11th of April, 1854, since which time he had deceased. To the admission of each of these depositions, the defendant objected, but the same were admitted by the court, and read, to which the defendant excepted.

Roberts & Chittenden for the defendant.

A. L. Miner and *E. Edgerton* for the plaintiff.

The opinion of the court was delivered, at the circuit session in June, by

REDFIELD, CH. J. The objection to the admission of the deposition of William E. Sheldon is, that it was not filed in court thirty days before it was offered in evidence, being taken *ex parte*. The statute, at the time it was taken, required this. But that section was repealed before the trial. Upon general principles, the deposition being taken properly, and nothing being requisite to make it evidence, but filing in court, thirty days before the time of its being offered in evidence, and there being ample time in which to do that, and that requirement being then unconditionally repealed, we should naturally conclude the deposition was admissible, without being filed in court, as the former statute required. A statute repealed could scarcely be regarded as of any continuing force. This would be the only view which would occur to any one, perhaps, on the subject, had the repealing statute contained no further provisions, in regard to the taking of depositions in future. And the only thing which raises the implication here, that the legislature did not intend to increase the facilities for admitting *ex*

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parte depositions is, that this very statute provides, that all depositions, taken after that date, shall not be admissible, unless taken upon notice. And this, no doubt, as a mere ground of conjecture, renders it highly probable that the legislature had not this case in mind, in making such repeal or they would have excepted it. But this consideration will scarcely justify us in incorporating such an exception into the statute.

But in regard to the deposition of the party, we think the statute of 1852 did not contemplate that the parties would be examined as witnesses, in any other mode than in open court, before the tribunal trying the facts. This was, at the time, the known and settled law in regard to the examination of parties, in other actions, when they were admitted to give evidence, and we see nothing in the statute justifying the belief, that this statute intended to put the parties, in other actions, upon any more favorable ground. And it seems to us, the 2d section of the act of 1852, in regard to the examination of the parties, very clearly indicates that they were expected to be examined in open court.

Judgment reversed and case remanded.

JOHN D. DICKINSON v. FENNER KING.

Payment by note.

A promissory note, given upon an open account, when, and how far operating as a payment.

A note, given only as collateral, will not operate as a payment, though the creditor has negotiated and obtained the money, and a judgment in favor of the endorsee against the maker has been rendered upon it, if the judgment remains unsatisfied and the claim of the endorsee has been provided for, by the creditor, in some other way.

BOOK ACCOUNT. The auditor reported a balance in favor of the plaintiff, dependent, as to its amount, upon the opinion of the court upon the following facts. The defendant made and delivered

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to the plaintiff, his promissory note for \$200, payable at the Commercial Bank, Troy, N. Y., which he charged to the plaintiff in his account; but it was not understood that the note was received by the plaintiff in payment; but the parties expected, on payment of the note, to have a final adjustment of the matter, on a settlement of the plaintiff's account. The plaintiff negotiated the note and received the money upon it, but it was not paid at maturity, and a suit was commenced and a judgment obtained upon it, against the defendant, in the state of New York, in favor of John B. Waldrat, to whom the plaintiff had transferred it. This judgment had never been paid, but the plaintiff had been obliged to pay, and had paid said note to the said Waldrat, and taken up the same, and he surrendered it before the auditor to be delivered to the defendant. If the amount of this note should be allowed to the defendant, the balance in favor of the plaintiff would be \$398.19; if otherwise, the balance would be \$600.26.

The county court, June Term, 1855,—PIERPOINT, J., presiding, rendered judgment for the smaller sum, to which the plaintiff excepted.

J. L. Stark for the plaintiff.

If the note was not received in payment, it will not be so considered, and the defendant will not be permitted to recover it in an action on book. *Follett & Bradley v. Steele*, 16 Vt. 34; *Rousseau & Warren v. Cull et al.*, 14 Vt. 83.

The fact that the defendant has suffered a judgment to pass against him, is no defense in this case, so long as he neglects to satisfy it.

Robinson & Sibley for the defendant.

If a promissory note is given for the price of goods sold, but not accepted as payment, yet, if the holder puts the note in circulation, it operates as payment, and extinguishes the prior indebtedness for which the note was given. *Torrey v. Baxter*, 18 Vt. 452; *Harris v. Johnson*, 3 Cranch 318.

The judgment against the maker, extinguishes the original indebtedness, and substitutes a security of a higher nature. *King v. Hoare*, 13 M. & W. 493-502.

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The opinion of the court was delivered, at the circuit session in June, by

ISHAM, J. The doctrine is well settled in this state, that a promissory note, given upon an open account, operates as payment of that account, and is a bar to an action upon the original indebtedness, provided there is no fraud or unfairness in giving the note. The general rule is the same, whether the note is that of the debtor or of a third person. The remedy of the party, in such case, is only upon the new security; *Hutchins v. Olcott*, 4 Vt. 549; *Farr v. Stevens*, 26 Vt. 299. The rule is founded upon the presumption that such was the intention of the parties when the note was given. That presumption, however, may be rebutted by evidence showing a different intention; and, in such case, the note will not be even *prima facie* evidence of payment, nor will it prevent a recovery upon the original account; *Follett v. Steele*, 16 Vt. 34; *Butts v. Dean*, 2 Met. 76; *Comstock v. Smith*, 22 Maine 262.

The auditor has stated, in his report, that, when this note was given, it was the understanding of the parties that it was not given or received in payment of the account. This finding of the auditor seems to dispose of the entire case. The object in giving the note was manifestly to enable the plaintiff to raise money upon it, and, if paid by the defendant, it was to be adjusted on a settlement of the account. But if not paid by him, no such application was to be made. The fact that this note was negotiated by the plaintiff, and that a judgment has been recovered upon it by the endorsee, in the state of New York, does not alter the case. The defendant has not paid that judgment, nor in any way satisfied the claim of the endorsee. The plaintiff has satisfied that claim, and has taken up the note. So far as the defendant is concerned, therefore, the case stands as if the note had never been negotiated. That judgment is not a satisfaction or merger of the plaintiff's claim, no more than any judgment would be when recovered on a matter held as collateral security.

In England no presumption of payment is raised by the execution of such a note, so as to bar a suit on the original indebtedness, when the note remains in the hands of the creditor, and is produced in court; *Smith's Mer. Law* 628. If such a note was given, and it has been transferred, for value, by the creditor, with-

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out rendering himself liable upon it, it will operate as payment; otherwise, the debtor might be compelled to pay the debt twice; 2 Greenl. Evid. § 520. But the decisions are uniform, that, if the note is negotiated so as to render the creditor personally liable upon it, and he has afterwards actually taken up the note from the hands of the endorsee, it will not operate as payment. The claim of the endorsee being satisfied, it will so far discharge the judgment that he cannot enforce its payment. In the case of *Tarleton v. Allhusen*, 2 Adol. & El. 32, where the purchaser of goods accepted a bill for the price, which the vendor endorsed over; and the endorsee recovered judgment on the bill against the purchaser, and afterwards the vendor took up the bill; it was held that the vendor was not paid for the goods, and a recovery was had in an action of assumpsit on the original indebtedness. The same doctrine is sustained in *Byles on Bills*, 184. In the case of *Kean v. Dufresne*, 8 Serg. & Rawle 233, it was held that a creditor taking a note which he endorsed and got discounted, but which he was afterwards obliged to pay, had not thereby received payment of an antecedent debt. The decision in the case of *Harris v. Johnson*, 3 Cranch 318, was made under that qualification of the rules. We are satisfied that the plaintiff is entitled to recover, in this action, the whole amount of his account, without deducting from it the amount of this note.

The judgment of the county court must be reversed, and judgment rendered for the plaintiff for the largest sum reported by the auditor.

Bowen v. Thrall et als.

ANDREW BOWEN v. REUBEN R. THRALL, GIDEON S. TABOR
AND AARON JOHNSON.

[IN CHANCERY.]

Transfer of overdue note. Warranty deed. Relief against incumbrances.

A person taking an overdue bill or note takes it subject to the equities, affecting the instrument itself, to which it is subject in the hands of the person from whom he receives it.

In a contract for a warranty deed, a deed containing the usual covenants of seizin and against incumbrances is intended.

Equity will not allow a grantor of real estate to recover the whole purchase money, while there are incumbrances on land, which he is bound to discharge: the purchaser will be permitted to retain of the purchase money sufficient to indemnify him against the incumbrances, particularly if the grantor is insolvent, and there is no adequate remedy on his covenants.

The orator purchased of the defendant J., an undivided half of a certain saw-mill, &c., which J. agreed to convey to him by a warranty deed, containing the usual covenants of seizin and against incumbrances. The deed given conveyed only J.'s "right, title and interest in" the premises, and contained no covenant except one to warrant and defend the "aforesaid premises." The premises were incumbered by a mortgage previously given by J., by virtue of which the mortgagee subsequently took and held possession, and the defendants were endeavoring, by an action at law, to collect a note given by the orator towards the purchase money. *Held*, that the deed executed was not conformable to the contract, and that the orator was entitled to an injunction against the collection of the note, until the mortgage incumbrance was removed, and a deed given agreeable to the contract.

APPEAL FROM THE COURT OF CHANCERY. A statement of the facts, the object of the bill, and the decree of the court of chancery, will be found in the opinion of the supreme court, which after argument by

A. L. Miner for the orator,

and by

Thrall & Smith for the defendants,

was delivered, at the circuit session in June, by

ISHAM, J. The general object of this bill in chancery is to obtain relief from the payment of a promissory note, executed to

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Aaron Johnson or bearer, on the 30th of March 1840, and made payable on the first of April, 1843. The note is now sued at law in the name of Mr. Thrall. The chancellor decreed a perpetual injunction upon the further prosecution of the suit on that note. The case is now brought before this court by appeal, and the question arises whether, upon the facts existing in the case, that decree was properly made.

It is stated in the bill that this note is still the property of Mr. Johnson; that it was delivered by him to Mr. Tabor, for collection, and for no other object, and that for the same purpose, the note was delivered, by Tabor, to Thrall. Thrall, in his answer, admits that he has no personal interest in the note, and that he commenced the suit in his own name for collection, and for the benefit of Tabor, from whom he received it. So far, therefore, as Thrall is concerned, the note is subject to every defense that it would be if it had been prosecuted in the name of Tabor. Tabor, in his answer, denies that this note is the property of Johnson. He says that it was transferred to him by Johnson, as collateral security, for advances which he had, and which he thereafter was to make; and that, relying upon that security, he had advanced to Johnson about one-half of the amount of the note. He denies any knowledge of the contract or dealing of the parties, from which the note originated, or that any defense existed to it. He admits, however, that he received the note from Johnson, after it was over due, and that he delivered the note to Thrall for collection, and that, when collected, after the payment of his advances, the surplus belongs to Johnson. The same facts, in relation to the transfer of the note to Tabor, are substantially stated by Johnson, in his answer. The indefinite manner in which that matter is left in the several answers, as to the amount of those advances, the time when they were made, and of what they consisted, and the repeated declarations of Tabor, as proved by several witnesses, that he had no interest in the note, nor in the suit then pending upon it, and that the affairs of Johnson were deranged, and were placed in his hands for the purpose of arranging them, and removing from him the embarrassments they occasioned, leaves the matter doubtful, to say the least, whether the facts stated in the bill are not sufficiently proved. That question, as one of fact, however, does not become

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very material in the case, as Tabor admits that the note came into his hands over-due. Under such circumstances the rule is the same in equity as at law, "that a person who takes a bill or note after it is due, takes it subject to all objections in respect of consideration or illegality, and of all equities affecting the instrument itself, to which it was liable in the hands of the person from whom he received it; provided the equity or defense arises out of the note or bill transaction." Chitty on Bills 245. Story on Bills, § 220. *Walbridge v. Kibbee*, 20 Vt. 543. *Robinson v. Lyman*, 10 Conn. 30. *DeMott v. Starkey*, 3 Barb. Ch. 403. *Burrough v. Moss*, 10 B. & Cres. 558. *Rothschild v. Corney*, 9 B. & Cres. 891. The fact, therefore, that the note passed into the hands of Tabor, and from him to Thrall, after it became due, renders it subject to every defense, whether legal or equitable, which would be available between the original parties; the same, precisely, as if the note was now held and prosecuted by Aaron Johnson.

The whole subject of controversy is, therefore, resolved into the inquiry whether, as between the original parties to that note, the facts proved in this case will justify an application to a court of chancery for the relief for which the orator has prayed. On that subject, it appears that on the 30th of March, 1840, the orator contracted with the defendant Johnson for the purchase of one equal and undivided half of a saw-mill in Dorset, known as the "Markham Mill," together with a small tract of land adjoining, and that the note now in suit, with the two others which were paid as they became due, were given in payment for the property so purchased. It also appears that, at that time, these premises were, and had been from the 17th of June 1837, jointly owned by Johnson and one Benoni Fisk, in equal and undivided moieties, and that they were also the owners of about fifty acres of land adjoining these premises, and that on the 17th of June, 1837, all these premises were mortgaged to Luman Markham, for the payment of about \$378.33, which, with the interest upon it, was due at the time of the conveyance from Johnson to the complainant. That mortgage was afterwards transferred to J. & R. Vail & Co., who, since the 1st of April, 1845, have, as assignees of the mortgagee, been in possession of the mortgaged premises. Johnson, in his answer, admits the execution of the mortgage deed, its assignment to the

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Vails, and their possession of the premises ; but he denies the statement in the orator's bill, that the premises were to be conveyed by him under a warranty deed, with the covenants of seizin and against incumbrances. He states that he agreed only to convey his interest in the premises, or his right of redemption, and that he owned but an undivided half of the premises, which he agreed to, and did convey to the complainant, thus leaving the mortgage debt to be paid by the orator. That statement is a denial of the whole equity of the orator's bill, and if true, the complainant has no ground upon which to sustain this suit, for when real estate is conveyed, if the title fails, or if incumbrances rest upon the premises, there is no remedy at law or in equity, if there was no fraud in the sale, and the grantee has taken no covenants to secure his title, or protect himself against the incumbrances ; *Abbott v. Allen*, 2 Johns. Ch. 522 ; *Gouverneur v. Elmondorf*, 5 Johns. Ch. 79. Under those circumstances, the orator would be bound to pay the note now sued at law, and the incumbrances upon the land. We are satisfied, however, that that was not the understanding of the parties. We can entertain no doubt that Johnson did agree to convey to the orator an undivided half of the premises, by a warranty deed, containing the usual covenants of seizin and against incumbrances. These are covenants which, under the form of conveyances in this state, are usually inserted in deeds of that character, and when an agreement is made for a warranty deed, a deed with these covenants would be intended. If such a deed had been made by Johnson to the orator, the mortgage debt now owned by the Vails, would be a claim to be paid by Johnson. That such was the understanding of the parties is evident from the testimony in the case. It could have been with no other idea that the orator paid the value of the premises, independent of that debt, or that Johnson inserted the covenant of warranty in his deed.* The

* The commencement of the deed was in the usual form of a bargain and sale; the premises conveyed were described as "all my right, title and interest that I have in the premises, privileges and appurtenances of the saw-mill," &c. The habendum clause was in the usual form, and then followed this covenant: "And I the said Aaron Johnson, do for myself, my heirs, executors and administrators, covenant to and with the said Andrew Bowen, his heirs and assigns, that I will warrant and defend the aforesaid premises to him and them, against all claims whatsoever," after which followed the *in test.* clause.

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testimony of Lewis Curtis, who drew the deed, and Daniel Curtis, who was present when the deed was drawn, is sufficient to show that instructions were given, by both parties, to draw a deed of that character, and that such a deed was intended to have been drawn. The testimony of Lewis and Daniel Curtis, James Lyndon and William Albee, is full, in showing that the sum due on the mortgage debt was to be paid by Johnson, and that he relied on the debt due to him from Daniel Curtis, for that purpose, but was prevented from paying it in that manner by the failure of Daniel Curtis. That being the contract between the parties, the deed should have been drawn, with such covenants as would carry that intention into effect. It is obvious that the deed which was given, is not, in any sense, a fulfillment of that contract. The deed purports to convey, not an undivided half of the premises, but all Johnson's right, title and interest in the premises described. If we were to regard this as a deed purporting to convey the land itself, and the covenant of warranty as a security to the grantee for its title, it would not be a conveyance of the undivided half, but of the entirety—a conveyance of the whole lot. That construction the orator does not contend for in his bill. The effect of the deed, therefore, is to convey simply his right and title to the premises. If Johnson had any title or interest in the land, it passed by the deed. If he had none, the deed was of no value, for it conveys no interest whatever, and the covenant of warranty is of no practical benefit, as that is a security to the grantee for such an interest only, as the deed, in its premises, purports to convey; *Mills v. Catlin*, 22 Vt. 104. The legal effect of the deed, therefore, is that of a quit claim deed merely, leaving the mortgage debt now due to Vail & Co., as well as the note, now prosecuted by Thrall, to be paid by the orator. That result the parties did not intend, and against it the orator seeks relief. At law the orator is without adequate remedy, as the deed must there be enforced as it was drawn, and as the deed contains no covenant against incumbrances, the orator has no defense at law to that note. Courts of equity, however, will protect the rights of the parties, under that contract, and enforce it in the same manner, and to the same extent as if the deed had been drawn and executed as it should have been; 1 Story's Eq. 64 g; 2 do. § 790-1,

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Whatever may be the rule at law, a court of equity will not permit a grantor to recover the entire purchase money, and leave unpaid incumbrances upon the land which he is under obligations to discharge. The purchaser has a right to retain so much of the purchase money as is sufficient to secure him against the incumbrances on land, particularly where the grantor is insolvent, and no adequate remedy can be had on his covenants. That doctrine was expressly ruled in the case of *Tourville v. Naish*, 3 P. Williams 307; *Sargent Maynard's Case*, 2 Freeman 1; 1 Vesey 88. The doctrine was also recognized by CH. KENT, in *Abbott v. Allen*, 2 Johns. Ch. 521. In the cases of *Christy v. Reynolds*, and *Todd v. Gallagher*, 16 Serg. & Rawle 258, 261, it was held, that "the discovery by the vendee, before payment, of incumbrances, is a valid defense in a suit at law, for the purchase money to the amount of the incumbrances." In that state they have no court of chancery, and therefore equitable principles are administered in their courts of law. As the incumbrance in this case much exceeds the amount of this note, we think it cannot be recovered from him, until that incumbrance is removed, and the title of the orator is made good, agreeable to this contract.

The decree of the chancellor, enjoining the suit at law, is affirmed. and also in relation to the costs at law and in equity.

ISAAC MCDANIELS v. GEORGE W. ROBINSON.*Inn-keeper.*

Leaving a horse with an inn-keeper does not render him liable, as such, for the keeping of a bag of gold or other dead property delivered to him by the owner of the horse during the time the horse is kept, if the owner is not personally a guest, and the delivery of the property is a distinct transaction, disconnected in consideration, and in fact, from the delivery and keeping of the horse.

ASSUMPSIT for \$4,000, being two hundred double eagles, left with the defendant, as an inn-keeper. Plea, the general issue; trial by jury, December Term, 1855,—PECK, J., presiding,

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The plaintiff gave evidence tending to prove that from a time anterior to the 26th of February, 1851, until and after the 6th of March following, the defendant was keeping an inn, in Bennington; and that the plaintiff, on said first mentioned day, became a guest at said inn, and so continued until the said 6th of March, at night; and that on the 5th of March, about sunset, he delivered to the defendant, within said inn, two hundred double eagles, in gold, to keep for the plaintiff through the night of said 5th of March.

The defendant gave evidence tending to show that said money was stolen from said inn, at some time during said night, by some person unknown, by a burglarious entry from without; with other evidence tending to show the degree of his care and vigilance in keeping said money.

The plaintiff claimed that the defendant held said money in the character and under the responsibilities of an inn-keeper.

The defendant gave evidence tending to show that the plaintiff, immediately after the defendant received said money, left said inn, lodged away from it that night, at his brother's, and that when he thus left he intended to terminate his *personal* stay at said inn, without any intention to return to it to receive any further meals or lodging in it; and that he did not return to it until after said loss. It appeared from the evidence of both parties, that the plaintiff brought with him to said inn, on his arrival there on the said 26th of February, 1851, a horse, harness, wagon and buffalo robe, which were then received by the defendant and put into the stables of said inn, and were kept there continuously by the defendant, from that time until the said 6th day of March, at night; and that the plaintiff returned to said house, as before stated, on the morning of said last mentioned day, after breakfast, and remained there until night, when he finally left said house, and took away his said horse, wagon, harness and buffalo robe.

The plaintiff claimed, and so requested the court to charge, that the continuance of said horse at said inn, as above stated, continued the plaintiff's relation as a guest at the inn, so as to charge the defendant, in his character as an inn-keeper, and not as a common bailee merely, for the safe custody of said money, notwithstanding the jury might find that the plaintiff was intending, at the time he so left said inn as aforesaid, and at the time of said loss, not again

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to return personally to said inn. The court declined so to charge, but instructed the jury, in effect, that, although the keeping of the plaintiff's horse, under the circumstances detailed in the evidence, might render the inn-keeper liable, as such, for the security of the horse, and the appendages of the horse, a like liability would not necessarily thereby arise in relation to the money; that if the jury should find that the plaintiff had intentionally determined his own stay at the inn, immediately after the delivery of the money, and before the loss, not intending to return to the defendant's house as a guest, intending from that time to take up, and had taken up his abode at his brother's, the fact alone that the horse of the plaintiff remained in keeping at the defendant's stable from February 26th to March 6th, did not make the plaintiff a guest of the defendant, so as to render the defendant liable, as inn-keeper, for the safe-keeping of the bag of gold, if the jury should find that the delivery of the bag of gold was a distinct transaction, disconnected in consideration, and in fact, from the delivery and keeping of the horse; but that the fact that the horse was thus kept was evidence tending to show that the plaintiff had not thus intentionally abandoned the defendant's house, and terminated his connection with it as a guest. To the refusal of the court to charge as requested, and to the charge, as above detailed, the plaintiff excepted.

E. Edgerton for the plaintiff.

D. Roberts for the defendant.

The opinion of the court was delivered, at the circuit session in June, by

BENNETT, J. The principal question raised on this bill of exceptions is, was the money in the custody of the defendant, as inn-keeper, at the time of its loss? We are to take it for granted that the jury have found that the plaintiff had intentionally determined his own stay at the defendant's inn immediately after the money was left with him, and before its loss, not intending again to return to the inn as a guest, and that the delivery of the gold to the defendant was a distinct transaction, disconnected in consideration, and in fact, from the delivery and keeping of the horse.

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It is claimed by the plaintiff's counsel, that the continuing liability of the defendant, as an inn-keeper, for the horse, harness, &c., rendered him liable, as inn-keeper, for the bag of gold, notwithstanding its delivery was a distinct transaction, and the determination of the plaintiff not to return again to the house personally as a guest. We apprehend that no one will question that, under the circumstances of this case, the defendant continued responsible, as an inn-keeper, for the horse. The horse was to be fed, and from this the inn-keeper had his profit; and it is not material, in this action, to inquire whether the inn-keeper continued also liable, as such, for the other property left with him at the same time; but we apprehend, as to the bag of gold, according to the finding of the jury, the relation of landlord and guest did not exist.

The leaving of the bag of gold in the custody of the defendant, had no connection with the original relation of landlord and guest between the parties; and when the money was lost, the plaintiff had ceased to be personally the guest of the defendant; and, indeed, we are to understand from the case, that when the plaintiff handed the gold to the defendant, he had made up his mind to leave the defendant's inn, not to return again to it, as a guest; and that he did immediately thereafter leave, with the intention not again to return; and in no proper sense could the plaintiff be said to be the *personal* guest of the defendant, at the time of the loss; and it would be going too far to hold that the leaving of the horse at the inn, under the circumstances of the case, made the plaintiff constructively a guest in relation to the bag of gold. It is well settled that, if a person leave at an inn, property from which the inn-keeper can derive no gain from its keeping, that is, *dead property*, as it is termed, and goes away himself, and it is stolen in his absence, he shall have no action against his host, as inn-keeper, for the reason that he was not a guest at the time. See *York v. Grindstone*, 1 Salkeld 388; *Gettey v. Cook*, Croke's James 188; 3 Bacon's Abridgement, Wilson's edition, p. 665, Title, Inn-keeper; *Grinnell v. Cook*, 8 Hill 435; *McDonald v. Edgerton*, 5 Barb. 560. In such a case, all that could be claimed would be to charge him as a bailee. It is clear that, if the leaving of the bag of gold with the defendant had been the beginning of the transaction, the defendant could not be charged for it, as inn-keeper, and

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we do not see that, in principle, the case can differ. The bag of gold was *dead property*, giving to the defendant no right to make gain from its keep, as inn-keeper; and it had no connection with the cessation or continuance of the original relation of host and guest; and, to say that the leaving of the horse at the inn is to have an effect upon the capacity in which the defendant can be charged for the safe-keeping of the money, is to say what we cannot well understand.

Judgment affirmed.

LEONARD BARNEY v. CHARLES W. GROVER.

Surety, his equitable right in reference to his indebtedness to his principal.

A surety has an equitable interest in his own indebtedness to his principal, arising from the implied contract of the principal to see him indemnified, which has relation back to the time of his becoming surety, and will prevail over any counter equity of a subsequent date.

A person will not be holden to an assignee for a debt due from him to the assignor, if he was liable, in an equal or greater amount, to another person, as surety for the assignor, which he has since paid, though he had not at the time of the assignment.

BOOK ACCOUNT. The auditor reported the following facts. The plaintiff failed, and on the 6th of April, 1852, assigned, for a valuable consideration, all his book accounts, among which was an account against the defendant, to Joel Valentine. At the time of said assignment there was due from the defendant to the plaintiff the sum of ninety-seven dollars and eighty-two cents, to balance book accounts between them. At that time the defendant was holden as surety for the plaintiff by having signed three promissory notes to Graves & Root, each for the sum of one hundred and eighty-seven dollars, bearing date the 25th of March, 1851, payable, one in six months, one in nine months, and one in one year from date,

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which, subsequently to said assignment, and after the defendant was notified thereof, he paid and took up.

The auditor further reported that if the amount paid by the defendant upon said notes, to Graves & Root, could be allowed in offset to the plaintiff's account, there would be a balance of \$ 576.72 due to the defendant; otherwise there would be a balance of \$ 119.82 due to the plaintiff.

Upon this report, the county court, December Term, 1855—PIERCE POINT, J., presiding,—rendered judgment for the defendant. Exceptions by the plaintiff.

Robinson & Sibley for the plaintiff.

The plaintiff is entitled to recover upon the principles decided in *Parker v. Kendall*, 3 Vt. 540, & *Cummings & Manning v. Fullam*, 13 Vt. 434.

The payment to Graves & Root, is a claim which has accrued to the defendant since the assignment and notice, and cannot be offset against the claim of the assignee; *Bishop v. Day et al*, 13 Vt. 81; *Taylor v. Mills & Maynall*, Cowp. 525.

Stark & Hall for the defendant.

The facts reported invested the defendant with the right, under the statute, to pay, at any time before audit, the sum he was liable for, and to have the same then adjusted; Comp. Stat. 290; *Ambler v. Bradley*, 6 Vt. 119; *Martin v. Fairbanks*, 7 Vt. 97; *Pratt v. Gallup*, 7 Vt. 344; *Porter & Ballard v. Munger*, 22 Vt. 191; *Chaffee v. Malarkee*, 26 Vt. 242.

To hold that this right is defeated by the assignment, is clearly inequitable. The assignee of a chose in action, takes it subject to all equities existing between the original parties, and his condition is not to be better than that of the assignor; *Foot v. Ketchum*, 15 Vt. 258, and cases there cited.

The opinion of the court was delivered, at the circuit session in June, by

REDFIELD, CH. J. This is an action of book account, prosecuted for the benefit of an assignee of the account. At the time the account was assigned, there was due upon it about \$ 100. But at

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the same time the defendant had become surety for the plaintiff by signing notes with him to a much larger amount, but had paid nothing. Since that time he has paid upon these notes a larger sum than the amount due upon the account. The question is whether, as against the assignee, he is entitled to have the amount so paid, set off against the account, in the hands of the assignee.

The assignee takes the account, subject of course to all offsets and equitable defences. And we think there exists in a surety an equity from the time of his assuming the relation, by virtue of the implied undertaking, on the part of the principal, to see him indemnified, and that, although no perfected right of action accrues until actual payment. Still such payment has such reference to the original undertaking of suretyship, that it overrides any equities of a subsequent date.

This was so held in a somewhat similar case, where the debt was attached by trustee process; *Strong v. Mitchell & trustees*, 19 Vt. 644, where it was decided that the trustee might offset payments made under precisely the same state of facts as in the present case; such payments being made after the service of the trustee process. The principle of that case is the same with the present.

And in the case of *Beach qui tam v. Boynton*, 26 Vt. 725 it was held that a surety, upon the payment of the debt, was to be regarded as a creditor from the date of his suretyship. The equity of the defendant in this case is therefore superior to that of the assignee.

Judgment affirmed.

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LYMAN PATCHIN v. DALMON N. STROUD.

Prior possession. Abandonment. Evidence.

In a case resting upon prior possession, a lapse of fifteen years or more between different acts is not conclusive evidence of an abandonment of the first possession. Whether abandoned, is a question of fact for the jury, which they may or may not find from the claimants having allowed so long a time to intervene.

TRESPASS ON THE FREEHOLD, for cutting wood on lot No. 17, 6th division, in Pownal. Plea, the general issue; trial by jury, December Term, 1855,—PIERPOINT, J., presiding.

The question litigated was in reference to the ownership of lot No. 17, both parties claiming it, and neither showing a sufficient paper title to it. The plaintiff claimed title by fifteen years possession, and also by a prior possession; and introduced testimony tending to prove acts of possession upon the premises, by the person under whom he claimed, thirty-four or thirty-five years before, and at different periods more recently, in reference to which the court charged the jury, that if they found that fifteen years, or more elapsed next after the first acts of possession, before there were any other similar acts on the part of the plaintiff and his grantors,—the first entry and acts of possession would not be available as a date for the commencement of a possession, on the part of the plaintiff or his grantors, either for the purpose of making title by fifteen years possession, or by a mere prior possession, even if the jury should not find in fact an actual abandonment by the plaintiff, or his grantors, of their claim to the premises. To this charge the plaintiff excepted.

Robinson & Sibley for the plaintiff.

A. B. Gardner, H. Canfield and U. M. Robinson for the defendant.

The opinion of the court was delivered, at the circuit session in June, by

BENNETT, J. The simple question raised on the bill of exceptions seems to be this, (and it is the only one which we are called upon to revise,) and that is whether, in a case resting

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upon prior possession, if fifteen years or more intervene between any of the acts of possession, does that *per se*, and as matter of law, constitute an effectual bar against the plaintiff from availing himself of the first acts of possession, even though the jury should find that in the meantime there had been no actual abandonment of the first possession. We apprehend it must always be a question of fact, whether a prior possession has been abandoned or not. Lapse of time, whether it be somewhat less or more than fifteen years, might go to the jury, as furnishing some evidence to prove an abandonment, but the weight of it would be to be judged of by the jury under the circumstances of each particular case, and if, on the whole, a presumption is to be drawn of an abandonment, it is a presumption of fact and not of law. It is in analogy to a case where a suit is brought upon a bond, and lapse of time is relied upon as a defense, it is not, in such case, relied upon as a technical bar, but is given in evidence under a plea of payment; and whether the presumption of payment, from lapse of time, has been rebutted, is a question for a jury, under proper instructions, in each particular case, as they arise. In the case before us, it was assumed by the court that the mere lapse of time was, in law, an abandonment of the first possession; and of course there is nothing in the exceptions which require us, or render it proper, to lay down any rules, or give any instructions as to what facts might be material by way of rebutting an inference attempted to be drawn from lapse of time.

Judgment reversed and case remanded.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF WINDHAM,
AT THE
FEBRUARY TERM;
AND AT THE
CIRCUIT SESSION, IN OCTOBER, 1856.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES:
HON. MILO L. BENNETT, }

CHARLES BLOOD v. JOHN J. CRANDALL.

Jurisdiction. Pleading.

A court will obtain jurisdiction as to both of two defendants, if they both appear by attorney and answer to the action, though the writ was served upon but one of them, and a *non est* return was made as to the other.

An averment, in pleading, that John J. Crandall became bail, by endorsing his, the said Crandall's, name of J. J. Crandall, on the writ, &c., is equivalent to an aver-

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ment that he endorsed the writ by the name of J. J. Crandall, and that this name is identical with that of John J. Crandall.

A declaration in *scire facias*, against bail, is insufficient if it shows that the defendant in the original action, (being an action *ex contractu*,) was a resident of one of the United States, and it is not averred that he was not a citizen, or that an affidavit was filed as the reason for the issuing of the process against his body.

SCIRE FACIAS against the defendant, as bail for Michael Fallon, The declaration averred that the plaintiff, on the 16th of June, 1851, took out his writ of attachment against Michael Healey and Michael Fallon, both of the state of New York, in an action of book account, and delivered the same to John J. Crandall to serve, &c.,—and that he served said writ, by arresting the body of said Fallon, and that the defendant became bail and surety for the said Fallon, &c.,—that the writ was returned and entered in court, and such proceedings had thereupon that the plaintiff recovered a judgment against the said Healey and Fallon for, &c.,—upon which judgment the plaintiff took out execution, upon which a *non est* return was made as to both the bodies and estate of the said Healey and Fallon, &c. (A more particular statement of the averments, which were held insufficient, is given in the opinion of the court, *q. v.*)

The defendant plead, 1st, *null tiel record*, to which the plaintiff replied that there was such a record, &c.,—and upon this issue, a certified copy of the writ and record relied on were introduced, from which it appeared that, upon the writ, the officer made a *non est* return as to Healey, but according to the record, “the said suit having been duly entered in court, the defendants came by * * * their attorney; and the defendants confessed that they ought to account,” &c.; and it was considered by the court “that the plaintiff recover of the defendants,” &c.

2d *plea*; that the defendant did not become bail and surety for the said Michael Fallon in manner and form, &c.; *replication*, that the defendant ought not to be admitted or received to plead said plea, because he, as deputy sheriff, made return on said writ, “that he, the said John J. Crandall, became his, the said Fallon’s bail, “by endorsing his, the said Crandall’s said name of J. J. Crandall, “on said writ, as bail thereon,” &c.; to this replication the defendant, after setting out the return in full, demurred.

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3d plea; that the execution against Fallon and Healey improvidently issued, and was void, for that it issued upon a judgment recovered in an action founded upon a contract, and that no affidavit was filed; and to this plea the plaintiff demurred.

The county court, September Term, 1854,—UNDERWOOD, J., presiding,—decided, upon the first issue, that there was such a record;—upon the second issue, that the replication was sufficient;—and, upon the third issue, that the plea was insufficient. Exceptions by the defendant.

Keyes & Howe, E. Kirkland and P. T. Washburn for the defendant.

R. W. Clarke for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. The first question made in the case is, in regard to the sufficiency of the record to show a valid judgment against both defendants, in the original action. There was a *non est inventus* return as to Michael Healey, but the record expressly states that both defendants appeared, by attorney, and answered in the action. This, of itself, was sufficient to give the court jurisdiction in the action as to both defendants, when there was no service at all, as there was not here, as to the defendant Healey; *Spalding v. Swift*, 18 Vt. 214. After such an appearance by attorney, the party is estopped, by the record, from denying the fact of appearance in the action. The only remedy is by application to the court rendering the judgment, and where the record remains; *Newcomb v. Peck*, 17 Vt. 302. It has been held that when, in such a case, the plaintiff takes judgment against both defendants, without any appearance for the outlawed party, that the judgment, as to him, is without any force.

The second issue ends in a demurrer to the replication, where the defendant's return is relied upon, as an estoppel to his pleading that he did not become bail. The only objection is to the certainty of the replication. But it seems to us there is no difficulty upon this point. The replication avers that the defendant, as deputy sheriff, made return, subscribed with his name, John J. Crandall,

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"that he, the said John J. Crandall, became his, the said Fallon's bail, by endorsing his, the said Crandall's said name of J. J. Crandall, on said writ, as bail thereon." It seems to us it requires a great deal of refinement upon language, as to identity and difference, to raise any fair and reasonable doubt as to the averment that the defendant endorsed the writ, as bail, by the name of J. J. Crandall, and that this name is identical with John J. Crandall. It is probable that objection is the most plausible that could be fairly made against the pleading, but it seems not a little shadowy.

In regard to the sufficiency of the third plea, it is undoubtedly true that, if the general process of the courts goes only against property, the party who attempts to justify the arrest of the body, by a *capias*, must show affirmatively the right to have such a writ. And, if the law exempts the body of all resident and non-resident citizens of this state, or the United States, as it did at this time; in a case of the kind just stated it would be incumbent to show positively, on the part of the plaintiff, that the person arrested was not a citizen, if that fact were relied upon as the ground of maintaining the *capias*. But the present case is somewhat different, in regard to the state of the pleading. Here the process issues as a *capias*, and it is, as against the plea, entitled to the common presumption in its favor, *omne rite actum*. It is the pleader here who attempts to get rid of the process, and presumptions are made, to a reasonable extent, against the pleader. It seems to us that if we can assume that the process, in the first instance, issued rightfully against the body of the defendants, merely because they were non-residents, (and in the absence of all showing the execution should rightfully follow the mesne process,) if the defendant claims an exemption, under a statute exempting one class of non-residents from arrest, and presents this by way of plea, he should, in his plea, allege that the defendants are of that class, *i. e.*, that they were citizens of the United States.

But the difficulty in this case is, that the declaration seems to us insufficient. It is averred that the plaintiff took his writ of attachment against two defendants, residing in the state of New York, such a writ, at the time alleged, June, 1851, by the general laws of the state, running against the body of all non-residents. But, in January after, the legislature required that

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all process, for the collection of matters of contract, whether mesne or final, should go only against the property of any citizen of the United States. The execution, in this case, issued after this date, and the averments in the declaration, in regard to the form of the writ, are perfectly general, merely that the party prayed out his writ of execution, signed by the clerk, and made returnable in sixty days, and delivered the same to the sheriff within thirty days from the rendition of the judgment, and procured a regular *non est* return to be made within sixty days from that date. Here is nothing to show, even argumentatively, that this execution went against the body, unless it is to be inferred from the fact that the sheriff made a *non est inventus* return upon the writ. But this might naturally enough have been a mere blunder. We should scarcely be justified in making any presumption upon such a basis. It is not even averred that the execution was in due form of law; and, if that is to be presumed, as perhaps it is, the result is, that we must take notice of the alteration of the law, at the session in 1851, and that, as the law stood at the time of issuing the execution, residents and non-residents were upon the same footing. The only difference was made in regard to citizenship. And, as the general presumption is in favor of citizenship, it seems to us it was incumbent upon the plaintiff, in his declaration, to aver that he took an execution against the body of the debtor, and we think, also, that he should have alleged that the defendants, or debtors, were not citizens, or else that he filed his affidavits, under the statute. This is different from a case where the debtor changed his residence, and thus acquired, under the former law, a right to have his body exempted from arrest on the final process. The plaintiff was not bound to take notice of such fact, even if made known to him, but might take an execution following the mesne process. But in the present case a general law exempts all citizens of the United States, who reside in any other state. The plaintiff's declaration shows that the debtors in this execution resided in New York, when sued, and we cannot presume they have changed their residence. They are, then, residents of New York, and it can scarcely be argued that the general *status* of residents is that of aliens. We must say, then, that as the law was at the date of the final process, the plaintiff was only entitled to a writ against the property, unless by

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filing an affidavit, or by alleging that the defendant was not a citizen. And, if the plaintiff relied upon either of these facts, both of which are exceptions, he should have averred the facts making the exception. This is, in principle, the very point decided in *Aiken v. Richardson*, 15 Vt. 500, since the case of residents and, non-residents, by the act of 1851, were placed upon the same footing.

We do not think the application of the act of 1851, to this case, is impairing the obligation of contracts, within the United States constitution, as it pertains only to the remedy; and before the bail is fixed, the creditor cannot be justly said to have acquired any vested interest in, or by the undertaking of the bail. It is a mere possibility.

Judgment reversed and, unless the plaintiff chooses to amend his declaration, we shall proceed to enter up the proper judgment for the defendant.

GARDINER C. HALL v. THE VERMONT & MASSACHUSETTS
RAILROAD COMPANY.

Contract. Corporation. Directors. Reasonable expenses. Statute of limitations.

Charges against the defendants, (an incorporated railroad company,) for services rendered by the plaintiff in procuring the passage of their act of incorporation, disallowed;—the services appearing to have been voluntarily rendered, and there having been no subsequent promise to pay them. No previous promise could be implied, when, at the time the services were rendered, the defendants were incapable of making an express contract.

Charges for services of the plaintiff, who was one of the corporators named in the defendant's act of incorporation, in procuring the stock subscriptions necessary for a full organization of the company, allowed, though there was no express promise for their payment. The services being necessary, a promise for their payment would be implied.

Charges allowed also for services rendered by the plaintiff as a member of a committee of the corporators, and also of the directors, for procuring additional stock subscriptions, the corporators having voted, at the time the plaintiff was appointed a member of the committee, "that all reasonable expenses incurred in making



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stock shall be audited and allowed;" and the directors, at the time the plaintiff was appointed a member of their committee, having voted to allow such compensation as they should deem proper, not exceeding one per cent if the subscriptions should be satisfactory,

Held that the "reasonable expenses" mentioned in the vote of the corporators was not limited to cash expenditures, but extended also to personal services expended.

Charges for similar services rendered after a rescision of the above vote of the directors, and after the stockholders had voted that no compensation should be allowed for such services, except under particular circumstances, disallowed.

Directors, as a general rule, are not entitled to compensation for their personal services unless rendered under some express contract.

The statute of limitations does not commence running against a foreign corporation until they have attachable property in this state, although, previous to that time, there may be directors and stockholders of such corporation residing in the state.

The statute, (Comp. Stat. ch. 81 §19, p. 244,) providing for the service of writs upon corporations, by leaving copies with any of their officers or stockholders in the absence of their clerks, has reference exclusively to corporations within this state.

BOOK ACCOUNT. The nature of the disputed items in the plaintiff's account, sufficiently appear in the auditor's report, which was as follows.

"I find and report, that there is due from the defendants to the plaintiff, to balance book accounts between them, the sum of \$ 893.55,—subject to the opinion of the court upon the following statement of facts."

"The defendants are a corporation, chartered by the legislature of Massachusetts on the 15th day of March, 1844. Charges numbered 80, 81 and 82, in the plaintiff's account, are for services rendered by him, at Boston, in endeavoring to procure the charter, previous to its enactment. The citizens of Brattleboro, where the plaintiff resided, were desirous that the corporation should be created, and held public meetings, and appointed committees to act in the matter, and many citizens of Brattleboro went to Boston for that purpose, and, among others, the plaintiff, who was a large real estate holder in Brattleboro, and felt a deep interest in the matter, expecting that the value of his estate would be thereby advanced. The services charged for were rendered by him, and are charged at a reasonable price. The plaintiff was not employed by any per-

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son to go to Boston for this purpose; and there has been no express promise by the defendants to pay for these services; and I have disallowed the charges. But if the law, under these circumstances, will imply such promise, so as to make the defendants liable, then the said items, with the interest thereon, amounting to \$119,39, should be added to the above sum of \$893,55.

"The plaintiff was one of the corporators named in the defendant's charter, and, as such, he rendered necessary services in attending various meetings of the corporators held after the acceptance of the charter by them, and previous to the ultimate organization of the corporation by the stockholders and the choice of directors,—which was November 21, 1844. There has been no express promise by the defendants to pay for these services; but being of opinion that such promise would be implied, I have allowed the items for these services,—numbered 83, 84, 85, 88 and 90. If this conclusion as to the law is erroneous, then the amount of these items, with the interest,—being \$18.12,—is to be deducted from the above named sum of \$893.55.

"At a meeting of the corporators, held May 21, 1844, at which the plaintiff was present, the corporators voted as follows, "that all reasonable expenses incurred in taking stock shall be audited and allowed by this board," and appointed the plaintiff and one Everett a committee "to make arrangements for going to Boston to take stock." Efforts were then made by the plaintiff, and by others, to procure subscriptions to the capital stock, and so much was obtained, that, on the 21st of November, 1844, the corporation was organized, the charter accepted and by-laws adopted; and on the 22d of November, 1844, directors were chosen, of whom the plaintiff was one. At a meeting of the directors, held January 15, 1845, at which the plaintiff was present, the following vote was passed,—"that a committee of three be appointed to obtain additional subscriptions to the stock of the corporation, to an amount not exceeding \$300,000.00, and, in case the subscriptions shall be satisfactory to this board, to allow such compensation as this board shall deem proper, for obtaining such additional stock, provided that the compensation shall, in no case, exceed one per cent on the amount of the subscriptions so obtained." At a meeting of the di-

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rectors, held February 6, 1845, at which the plaintiff was present, it was voted as follows,—“that the vote passed January 15th, concerning obtaining subscriptions and paying a compensation therefor, be and hereby is rescinded.” And at a meeting of the stockholders, held February 18th, 1845, at which the plaintiff was present, a vote was passed as follows,—“that no bills for personal services, or expenses, for procuring subscriptions for stock, be allowed to any person unless employed by the corporation, and that no compensation shall be allowed to the directors of the corporation for their services in that capacity.”

“Items No. 86, 89, 91, 92, 93, 94, 1, 3, 5 and 7, of the plaintiff’s account, are charges for services rendered by him in procuring subscriptions, in Boston, to the capital stock of the corporation, subsequent to the vote of May 21, 1844; and items Nos. 4, 6 and 8, are for cash expenses incurred by him, while so employed. The defendants insisted, at the hearing, that the vote of May 21, 1844, should be construed only as a promise to pay the cash expenses incurred in procuring subscriptions; but being of opinion that the vote, under the circumstances, should be construed as extending to personal services expended, as well as to cash expenses, and that the appointment of the plaintiff upon the committee then raised was an express authority to him to render such services, I have allowed the items as charged, except item No. 94, which I have allowed at \$20.00, and item No. 7, which I have allowed at \$30.00. As allowed, the services were rendered, and the price charged is reasonable. The cash expenses incurred by the plaintiff in 1844, while engaged in this business, have been heretofore paid by the defendants. If the defendants are correct in their construction of the vote of May 21, 1844, and, in law, it restricted the right to charge to cash expenses only, items No. 86, 89, 91, 92, 93, 94, 1, 3, 5 and 7 should be disallowed, and their amount with the interest thereon, being \$382.72, should be deducted from the sum of \$893.55, above mentioned. Or, if the defendants are not bound by any agreement of the corporators to pay for these services, and no promise to pay for such services, will, in law, be implied against the corporation, until after its organization by the choice of directors in November, 1844, then items No. 86, 87, 89,

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91, 92, 93 and 94 should be disallowed, and their amount, with the interest, being \$ 238.58, should be deducted from the above named sum of \$ 893.55.

" Items No. 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 30, 33, 35, 37, 39, 41, 43, 46, 48, 50, 52, 54, 56, 58, 61, 64, 66, 68, 70, 73 and 77, are charges for services rendered by the plaintiff, as director, subsequent to the vote of February 13, 1845, and I have disallowed them.

" Items No. 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 31, 34, 36, 38, 40, 42, 44, 47, 49, 51, 53, 55, 57, 59, 60, 62, 63, 65, 67, 69, 71 and 74, are charges for cash expenses incurred by the plaintiff, while rendering services for the defendants as director. The plaintiff's right to recover for these charges was not controverted, (except in respect to the statute of limitations, as hereinafter stated,) and I find the amount correct, and allow them as charged, with the exception of Nos. 60 and 63, which I have allowed at \$ 3.00 each. * * *

" The defendants insisted upon the statute of limitations, as a defense to items No. 80 to 94 inclusive, and to items No. 1 to 18 inclusive, being all the items which accrued previous to August 21, 1845. The writ in this suit bears date, August 21, 1851, and was served August 23, 1851. It was conceded that there has always been a director of the defendants' resident in Brattleboro, within this State, and that there have also, at all times, been stockholders of the defendants resident within the state since the organization of the defendants in November, 1844. But the defendants first had known attachable property within this state in 1847. * * *

" If, upon these facts, the statute of limitations applies to all that portion of the plaintiff's account, which accrued previous to August 21, 1845, there should be disallowed, in addition to the items charged previous to that date, which I have above stated as disallowed, items No. 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 1, 3, 4, 5, 6, 7, 8, 10, 12, 14, 16 and 18,—amounting, with the interest, to \$ 555.40,—which sum of \$ 555.40 should be deducted from the above named sum of \$ 893.55. * * *

" The defendants gave in evidence their act of incorporation, together with the general railroad law of Massachusetts, from the revised statutes of Massachusetts of 1835; and the same are made

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a part of this report, so far as they affect any of the questions herein submitted."

On the foregoing report, the county court, September Term, 1854,—UNDERWOOD, J., presiding,—rendered judgment for the plaintiff, to recover the amount allowed by the auditor, to which the defendants excepted; and the plaintiff excepted to the disallowance of all disallowed by the auditor.

E. Kirkland for the defendants.

J. D. Bradley for the plaintiff.

The opinion of the court was delivered by

ISHAM, J. The auditor has reported the sum of \$893.55, as being due to the plaintiff on his account, for which sum judgment was rendered by the county court and on which both parties have taken exceptions. The charges in the plaintiff's account, No. 80, 81, 82, amounting with the interest thereon to the sum of \$119.39, were properly disallowed. Those services were rendered by the plaintiff at Boston, in conjunction with other citizens of Brattleboro, in procuring the charter of this company, and they appear to have been voluntarily rendered, as it was anticipated by him that the construction of the road would give an increased value to his real estate. The plaintiff could not have been employed by the defendants to render those services, for the corporation at that time had not a legal existence, nor has there been any subsequent promise to pay for them; and certainly, none can be implied against parties, when, at the time the services were rendered, they were incapable of making an express contract.

The charges No. 83, 84, 85, 88, 90, amounting to \$18.12 were for services in attending various meetings of the corporators, after the charter was granted, and previous to the organization of the company in the choice of directors. Those charges, we think, were properly allowed. The plaintiff with others and their successors were, by the charter, made a corporation, having the powers and privileges, and subject to the duties and liabilities contained in the general act of Massachusetts, relating to railroad corporations. Among other matters required by the charter, subscriptions

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to the capital stock of the company to the amount of five thousand shares, were necessary before an organization could be perfected. The duty rested upon the corporators to do whatever was required by the charter to effect that result. It may be true that the company were not invested with full corporate powers until after the stock was subscribed, and their organization perfected in the choice of directors; yet, the corporation was *in esse* before that event; it had an inchoate existence, and the corporators had the power, and were so far the agents of the corporation as to bind them by any act which they were required to do, or which was necessary to perfect their organization under the charter. Upon that principle was decided the case of the *Vt. Central R. Co. v. Clages*, 21 Vt. 30. The auditor has found that the services were necessary, and though no express promise has been made by the defendants to pay for them, we think, under the circumstances, one will be implied.

The charges Nos. 86, 87, 89, 91, 92, 93, 94, 1, 3, 5, and the charges for cash expenditures, Nos. 4, 6, 8, were also, we think, properly allowed. It appears from the report of the auditor that on the 21st of May, 1844, the *corporators* passed a vote that "all *reasonable expenses* incurred in taking stock shall be audited and *allowed by this board.*" At the same time the plaintiff and one Everett were appointed a committee to obtain stock subscriptions at Boston. In pursuance of that vote stock subscriptions were procured, so that the company were organized on the 22d of November, 1844, and directors were chosen. On the 15th of January, 1845, a vote was passed by the directors, of which board the plaintiff was a member, "that a committee be appointed to obtain additional subscriptions to the stock of the corporation to an amount not exceeding \$300,000, and to allow such compensation as the board shall deem proper,—provided that the compensation shall, in no case, exceed one per cent on the amount of the subscriptions so obtained." The charges above enumerated are for services rendered under those votes. The auditor has stated that the services were rendered, that the charges are reasonable in amount, and, the corporation having received the benefit of them, we think they are liable for the amount allowed. We are also satisfied that under the vote of May 21, 1844, the plaintiff's claim is not limited to cash expenditures merely, but that he is also entitled to a reasonable

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compensation for his personal services. In the case, *Regina v. The Gov. & Guard. of the Poor of Kingston on Hull*, 20 Eng. L. & Eq. R. 149, the words "*expenses incurred*" were limited to cash expenditures. In that case the town clerks were directed by act of Parliament to prepare lists of persons entitled to vote for members of Parliament, and the *expenses incurred* were to be repaid. From the phraseology of the act, it was considered to be the intention to add to the official duty of the town clerks the performance of that duty without additional compensation, except for cash advances. That such additional duties may be imposed on public officers in that manner, was decided in that case, as also in the case of *Jones v. Mayor of Carmathen*, 8 Mes. & Wels. 605. But, we think, a different construction should be placed on this vote of the company. The plaintiff was not in the discharge of the duties of a public officer, neither was it competent for the board of corporators to impose on him the performance of those duties without compensation. The vote contains an express request for him to perform those services, and, we think, the intention was that he should be paid for them.

The charge No. 7, under date of February 24, 1845, for 18 days services at Boston, was allowed to the plaintiff; but we are unable to perceive any ground on which that allowance can be sustained. The vote of the corporators of May 21, 1844, was abrogated by the choice of directors, and by the vote of the directors of January 15, 1845. This vote of January 15 was rescinded on the 6th of February, 1845, when it was voted by the directors that "the vote passed January 15th, concerning obtaining subscriptions and paying a compensation therefor, be and hereby is rescinded." On the 13th of February, 1845, the stockholders voted, "that no bills for personal services and expenses for procuring subscriptions for stock be allowed to any person unless employed by the corporation, and that no compensation shall be allowed to the directors of the corporation for their services in that capacity." Independent of the vote of the stockholders on the 13th of February, concerning the effect of which we have no occasion to make any remarks, we think the plaintiff has no right to charge for his personal services, upon the strength of any of those former votes. For cash advances during the period the plaintiff was director, it appears

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that no objections were made to their allowance, except the statute of limitations. To justify the allowance of this charge, therefore, it should appear that those services were rendered, and that the corporation, by some act, have recognized his employment for that purpose with the intention of making compensation. No such fact appears in the case. The plaintiff must have understood, after the votes of February 6th and 13th, that no compensation for personal services was to be made. As a general rule, directors are not entitled to compensation for their personal services as such, unless they were rendered under some express contract or vote of the company to that effect; Ang. & Ames on Cor. 255; *Dunstan v. Imperial Gas Co.*, 3 Barn. & Ad. 125. That charge, therefore, should have been disallowed, as were all the other charges for his personal services subsequent to the passage of the vote of February 13th, 1845. The reasons for the disallowance of one, exist for the disallowance of the others.

The defendants have interposed the statute of limitations to all the charges in the plaintiff's account previous to August 21, 1845. The writ in this case was issued August 21, 1851. On this question it is only necessary to observe, that the defendants are a foreign corporation, and first had known attachable property in this state, in the year 1847. Upon these facts the case falls within the exceptions of the statute. The Comp. Stat. 379, §14, provides that if a person shall be out of the state when a cause of action of a personal nature accrues against him, the action may be commenced within the time limited, after such person shall come within the state. If the cause of action has accrued, and the person leaves the state before the statute has run, and has no known attachable property within it, the time of his absence is not to be taken as a part of the time limited for the commencement of the action. Corporations are undoubtedly within the provisions of this act, and until the defendants had attachable property in this state, no suit could have been commenced by the plaintiff on this claim. There was no mode of service by which the corporation could have been made subject to the jurisdiction of the courts in this state, until the year 1847, which is less than six years previous to the commencement of this suit. The statute, p. 244 § 19, directing all writs against a corporation, to be served by leaving a copy with the clerk of the corporation,

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or in his absence with some of its officers, and in their absence, with one of the stockholders, has reference exclusively to corporations within this state. The account, therefore, is unaffected by the statute of limitations. We perceive no error in the decision of the county court in this case, except in the allowance of the charge No. 7, under the date of February 24, 1845, which, we think, should have been disallowed.

The judgment of the county court must be reversed, and the amount of that charge with the interest thereon to September 21, 1854, must be deducted from the amount allowed by the auditor, and a judgment rendered for the plaintiff for the balance.

GARDNER C. HALL v. ROGER WADSWORTH.*Jurisdiction. Tenancy in common.*

The county court has original jurisdiction in actions of assumpsit, and for the use and occupation of real estate, brought in good faith, where the largest sum of principal, which the plaintiff could have expected to recover, was less, but with interest to the time of trial, amounted to more than one hundred dollars.

Held, upon the facts found by the referee, that the tenancy of the defendant in the present case was a tenancy from year to year.

In a tenancy from year to year, the tenant cannot quit at pleasure, without notice, and deprive the landlord of accruing rent. The landlord's right to notice is, to some extent, at least, reciprocal to that of the tenants.

The defendant leased of the plaintiff on the 27th of November, 1840, a dwelling-house, and occupied it thereafter as tenant, from year to year, until the tenth of November, 1862, when he quit, having given only two weeks previous notice of his intention to do so. *Held*, that he was liable for the rent to the 1st of April thereafter, the plaintiff making no claim for it beyond that time.

ASSUMPSIT for the use and occupation by the defendant of a dwelling-house of the plaintiff's. The action was referred, and the referee reported, after setting forth a specification of the plaintiff's claims, and of the payments made to him, as follows:

"November 27th, 1849, the defendant went into occupation of

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the plaintiff's dwelling-house, situated in Brattleboro village, under an agreement to pay an annual rent therefor of \$150, and continued such occupation till November 10th, 1852; a week or two before quitting, he sent word to the plaintiff that he was about doing so, who then replied to the messenger that he must pay rent till April, 1, 1853. I do not find that anything was agreed between the parties as to the length of the tenancy, or in what manner it might terminate.

"The plaintiff offered testimony tending to prove that the custom in Brattleboro is for yearly tenancies of dwelling-houses, to commence on the first of April. This testimony was objected to by the defendant, and was admitted, and I find the fact in accordance with it; and also that it is very unusual to let houses in the fall, and very difficult to do so. After the defendant left the house the plaintiff was unable to let it again, though effort was made until April, 1853. The said custom was known to the defendant as well as to the plaintiff. * * * * *

"At the time of the service of the writ in this case, the amount due to the plaintiff, provided everything were allowed him which he claimed, was \$92.90,—that is, that was the largest sum which the plaintiff could hope to recover, were every point of fact and law made by him, decided in his favor; and thus it appeared from his own books.

"If the plaintiff be entitled to recover rent for the time only, wherein the defendant actually occupied the premises, I find due the plaintiff, April 1, 1853, \$26.66. If he be entitled to recover rent up to the 27th November, 1852, the time when the even years reckoning from the commencement of the occupation would be out, I find due to him, April 1, 1853, \$34.15. If he be entitled to recover rent until April 1, 1853, I find due to him \$87.90; interest to be added to whichever of the above sums shall be taken by the court as the damages in this case, from April 1, 1853, to April 1, 1855."

In the county court, April Term, 1855,—UNDERWOOD, J, presiding,—the defendant moved to dismiss the action for want of jurisdiction. The court overruled the motion, and rendered judgment, on the report, for the largest sum reported in favor of the plaintiff. Exceptions by the defendant.

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E. Kirkland for the defendant.

Keyes & Howe for the plaintiff.

The opinion of the court was delivered by

BENNETT, J. The county court should not have dismissed this cause for want of original jurisdiction. There is nothing in the case to show any bad faith in bringing this suit originally to the county court. That court has apparent jurisdiction on the face of the process, and though the referee finds that the largest sum which the plaintiff could have expected to have recovered for principal, was less than one hundred dollars, yet when the claims were adjusted, the amount of principal and interest exceeded one hundred dollars. The plaintiff might well have apprehended that such would be the fact when he commenced his suit.

In regard to the sum for which a recovery should be had, it seems the possession commenced in November, 1849, at an annual rent of one hundred and fifty dollars, and continued, in fact, until the 10th of November, 1852.

No agreement was found as to the time the tenancy should expire, or in what manner it should be determined. Rent had been paid from time to time, down to the fourth day of January, 1853. From the facts found, we think, it became a tenancy from year to year, and that the defendant could not be ejected without a notice to quit; *Barlow v. Wainwright*, 22 Vt. 88.

In that case, it was also held, that the tenant could not quit at pleasure, and thus debar the landlord of all accruing rent. In a tenancy from year to year, a right to a notice should, at least to some extent, be regarded as reciprocal. The plaintiff in this case, when he was informed by the defendant, in the fall of 1852, that he was about to quit, only made a claim for rent up to the first of April, 1853, and, as it may well be supposed the defendant may have acted in view of such claim, the plaintiff should be limited by the claim then made, and indeed he does not now claim to recover any rent since that time.

The judgment of the county court is affirmed.

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ISAAC B. BARBER v. CHARLES CHAPIN.

Liability of trust property for purchases made for benefit of the cestui que trust on the personal credit of the trustee. Recoupment.

In an action to recover for trust property attached and sold upon process against the trustee personally, it cannot be shown that a part of the demand, for the recovery of which the process issued, was for property bought by the trustee for the benefit of the trust, and appropriated to the use of the *cestui que trust*, and the value of it be deducted in the recovery by way of *recoupment*, or otherwise, if it do not appear and is not claimed that there was any mistake, misrepresentation or other fraud in obtaining it on the personal credit of the trustee.

Instances in which the term *recoupment* is properly applicable to the reduction of damages by way of a *quasi offset* of a counter unliquidated claim.

TRESPASS, for taking certain oxen, farming utensils and crops. Plea, the general issue; and also that the defendant, as deputy sheriff, took the property by virtue of a writ of attachment in favor of Townsley & Son against the plaintiff, and sold the same on the attachment, under the statute. Replication, that the property attached was held by the plaintiff in trust for his wife Nancy Barber, and his children Wm. H. Barber, Albert L. Barber, &c., and that the suit was brought and prosecuted for their benefit. This replication was traversed, and the cause was tried by jury at the April Term, 1855,—UNDERWOOD, J., presiding.

The taking of the property, and that it was taken by the defendant, as a deputy sheriff, on a writ in favor of Townsley & Son, against the plaintiff, as set forth in the defendant's special plea in bar, was conceded; and it appeared that the defendant was indemnified by Townsley & Son for attaching the property, to recover for which this suit was brought; and it was further conceded by the defendant that the property sued for was trust property, as set forth in the plaintiff's replication, and was held by the plaintiff merely in trust for the benefit of the persons named as being the persons beneficially interested therein.

The defendant then, under the general issue, proposed to prove that the property sued for by said Townsley & Son, and for which they recovered judgment against the plaintiff, was property bought for the benefit of, and applied to the improvement and benefit of the trust fund, and for the use and benefit of the family named as the *cestui que trusts*, and claimed the right to have the said judg-

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ment of Townsley & Son deducted from the value of the property sued for by way of *recoupment*. To this defense and showing the plaintiff objected, and the court decided the evidence and defense inadmissible, to which the defendant excepted, and thereupon consented to a verdict in favor of the plaintiff for the full value of the property.

_____ for the defendant.

The court will undoubtedly protect the equitable interest of the *cestui que trusts*, but only so far as it has been invaded. The court, we think, will not let them recover for that which they have already had; *Stow v. Yarwood et als.*, Law Reports, Dec. 1853, p. 456.

The parties in interest, and the subject matter being the same, one suit is sufficient to settle both demands. Dyer 2 b.; 8 Viner Abr. 556-7; 2 T. R. 97; 15 Mass. 389; Story on Bail'ts § 315 & 349; 20 Wend. 267; Burrows 2214; 3 Met. 9; 14 Pick. 356; 6 Mass. 20; 3 Dana 489; 20 Conn. 204; 8 Vt. 83; 8 Vt. 407-413; 10 Vt. 506.

O. N. Davenport and H. E. Stoughton for the plaintiff, argued that the doctrine of *recoupment* was not applicable, and the evidence offered inadmissible; and that the whole matter relied upon as a defense, was *res adjudicata* by the decision in *Townsley et al. v. Barber et al.*

The opinion of the court was delivered by

REDFIELD, CH. J. The deduction which was claimed in the recovery, in the present action, whether it is called by one name or by another, must depend upon its justice and equity, certainly. One difficulty in regard to the claim has been to know if it can be shown to be strictly equitable. For, if so, it would seem the court of equity, when appealed to, would have sustained it. But it is admitted they did not. And, although the recovery of the defendant's, in the bill in equity, was not insisted upon by way of answer to the claim of *recoupment*, set up in this suit, and so is no part of the record, so that we could treat it as an estoppel upon the claim, yet the decision is equally binding upon the law of the case as an authority.

Barber v. Chapin.

That case not being reported,* we are not put in possession of the reasons upon which the case proceeded. But we suppose it must have gone upon the ground that, there being no fraud or misunderstanding between the parties, and no mistake, misrepresentation or misapprehension, they must be content to stand by their contract.

Had the plaintiff, by representing himself as the owner, or, perhaps, by having the possession and ostensible ownership of the property held in trust, gained a false credit with Townsley & Son, and especially had he have done this purposely, and the property obtained through this false credit had gone to the use of the *cestui que trusts*, it is very probable that a court of equity, in accordance with its usual laws of decision, would have afforded some relief. But nothing of that kind was offered to be shown in the present case. Here, for anything apparent, the fact of the property being trust property was well known to Townsley & Son, at the time the credit was given. And, if it had not been known, it might not have been the fault of the *cestui que trusts*, or even of the trustee. The credit, then, being given to the trustee personally, without fraud or mistake, we are unable to perceive any ground for deducting the amount of the credit from the judgment.

It will not aid the clearness of our perceptions, to go into the cases upon the subject of *recoupment*, or *recouper*, as it was at one time called. The modern use of this term is confessedly so indefinite as to afford no reliable grounds upon which it is safe to proceed.

It may be admitted that if the defendant is made liable in trover, or trespass, or case, or even in contract, for the conversion, or the price of a chattel, which he has himself repaired, or essentially enhanced the value of, at his own expense, under the belief that the title was in himself, or in some other from whom he received it, and at whose instance he made the repairs, or contributed to the enhanced value, he is not to be made liable for that portion of the value which he himself contributed. This is often called *recoupment*. So, too, if the defendant in such action has applied the chattel *bona fide*, or, perhaps even without that, has made the application of the chattel to the actual discharge of the plaintiff's

*The case has been reported since this opinion was delivered. See 27 Vt. 417,—*Townsleys v. Barbers*, (In Chancery.)

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debt, this is to reduce the recovery to that extent, and this is called *recoupment*, sometimes. So, too, in some of the cases, where the suit is brought upon a contract defectively performed, and the deficiency is, as it may be, shown in reduction of the amount of the recovery, it is called *recoupment*. There are many other instances of the application of this term *recoupment* to the reduction of damages, by way of *quasi* offset of counter claims not liquidated, and which on that account could not be treated as strict set-offs; 2 Parsons on Contracts 246-247, and notes and cases referred to.

But we can find no case where any such claim as the one made in the present case has ever been allowed to prevail at law. And although the party was undoubtedly well founded in his first view of the nature of his claim, that it was of a character perfectly cognizable in a court of equity, if any where, yet it seems it was not recognized even there. And although there may be a kind of moral equity in the state of facts offered to be shown by the defendant, in favor of those whom he represents, yet it is, we think, too remote and uncertain to constitute any legal ground of reducing the amount of the recovery. To determine the equity of this set-off it would be required to go into the entire state of the accounts between the trustee and his *cestui que trusts*, which could only properly be done in a court of equity, and if the party failed there, it would be strange if the same tribunal should afford redress at law, or, indeed, if any court of law should do it.

Judgment affirmed.

THE TOWN OF LONDONDEERRY v. THE TOWN OF ANDOVER,
Appellant.

Evidence of organization of a town. Settlement of paupers.
Proof of former residence.

The due organization of a town, previous to a particular time, may be presumed from the fact that at that time they had appointed town officers, and were exercising the rights and powers belonging to organized towns.

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A legal settlement could be obtained by one years continuous residence in a town in this state, between the years 1779 and 1787, and a settlement acquired in that way by a father, would be communicated to his minor children.

And a derivative settlement so obtained by a son, would be communicated to his children afterwards born out of the state, and while he was residing out of the state, if, during their minority, he removes with them into the state.

But if the father, after obtaining such a settlement, had removed to a foreign country, where his children were born, and from which he did not return during their minority; *Quære*, as to the children having their father's settlement upon their subsequent removal into this state.

The declarations of a person, as to the place of his former residence, are not admissible for the purpose of proving that he actually did reside in that place,

APPEAL from an order of removal of a pauper by the name of Maria B. Hathorn, from the town of Londonderry to the town of Andover. Plea, that said pauper was unduly removed, because her last legal settlement was not in said Andover; trial by jury, April Term, 1855,—UNDERWOOD, J., presiding.

The plaintiffs gave evidence tending to prove that said pauper had not gained a legal settlement in Londonderry, and that, before she removed to Londonderry, she had lived in Andover nearly eight years, after she was eighteen years old, and supported herself during said term. It was conceded that the pauper had resided in Andover a sufficient length of time to gain her a settlement there, provided she had previous thereto a settlement in any other town in this state. The plaintiffs relied upon one Eleazer Hathorn, Jr., having gained a legal settlement in the town of Reading, Vt., between 1779 and 1787; and gave evidence to the jury tending to prove that Eleazer Hathorn, the elder, moved from Jaffrey, N. H., with his son, Eleazer Hathorn, Jr., in 1781, or soon after; and that said Eleazer, Jr., was then about nineteen years old, and that he lived with his father until he was twenty-one years old, and then lived in different places in Reading for several years thereafter, before 1787, and then went to New Hampshire, and there married a wife, by whom he had several children; that his wife died, and about 1809 he married the pauper's mother; that the pauper was born in September, 1818, in Sullivan, N. H., and lived there in her father's family until 1825; then moved with her father's family to Springfield, Vt., and stayed there about three months; then removed to Andover, Vt., where she lived with the

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family until her father's death in 1826; and then lived with her mother in Andover until 1846; and then moved to Londonderry.

The defendants gave evidence tending to prove that the said Eleazer Hathorn, Jr., did not remove to Reading with his father, but continued to reside in said Jaffrey, until about 1787, when he came to Reading, stayed there several years, then returned to said Jaffrey, and lived there and in other towns in that vicinity, in New Hampshire, until he removed to Springfield, and that he resided in said Jaffrey in 1784, 1785 and 1786.

The evidence on the part of the plaintiffs to prove that Eleazer Hathorn, Jr., resided in Reading, previous to 1787, was contained in depositions of his widow, daughter, and several other persons, who appeared to have had no actual knowledge respecting his residence at so early a period, but deposed to what they had heard him and other members of his father's family say in reference to his and their having formerly lived in Reading:—to so much of the depositions as related to these declarations, the defendants objected, but the objections were overruled, and the depositions read.

There was no dispute but that Eleazer Hathorn, senior, moved to Reading some time in 1781, and evidence was given tending to show that the town of Reading was organized after he went there, but at what time such organization took place did not appear; and evidence was introduced by the plaintiffs, consisting of grand lists, deeds and records, showing, or tending to show that there were listers and a town clerk, and that the town was acting as an organized town as early as 1781.

The jury were instructed that the settlement of the pauper in the defendant town, depended upon their determination of the question, whether her father, E. Hathorn, Jr., obtained one in Reading between the years 1779 and 1787, as the testimony tended to show; if he did obtain such a settlement, the pauper would take it derivatively from him. They were further told, upon this point, that the important inquiry was *when* Eleazer Hathorn, senior, and his son, Eleazer Hathorn, Jr., went to Reading to reside; that if they should find that Eleazer Hathorn, senior resided and made it his home one full year continuously in Reading, between the years 1779 and 1787, and before the said Eleazer Hathorn, Jr. became of age, then they would find that the senior Hathorn obtained a

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settlement there, and the younger Hathorn obtained one derivatively from him. Or, if the jury should find that E. Hathorn, Jr., the pauper's father, resided in Reading after becoming of age, one full year continuously, and made it his home there between the years 1779 and 1787, then said E. Hathorn, Jr. gained a settlement there in his own right; and if he thus gained a settlement in either of these ways, the same would be communicated to and give the pauper a settlement there, by which she would now have a settlement in Andover, and their verdict must be for the plaintiffs.

Upon the subject of the organization of Reading, the jury were told that, from the fact that the several lists of that town put into the case, and sundry deeds showing that there were a town clerk and listers in Reading as early as 1781, and the town appeared from their records to have been officered and conducting affairs as an organized town, the jury might presume the town was duly organized. To this charge, and to the admission of those parts of the depositions which were objected to, the defendants excepted. Verdict for the plaintiffs.

S. Fullam for the defendants.

The sayings of E. Hathorn, Jr., were nothing more or less than hearsay. Such sayings are never received in evidence, except as a part of the *res gestae* accompanying and explaining acts, from which some inference may be drawn in favor of the issue. 1 Stark. Ev. 41, 44, 47, 49.

The jury were not at liberty to infer an organization of the town from the fact that such town had officers and lists, immediately after its first settlement. It might, perhaps, be inferred from an user for a sufficient length of time.

Lists would afford no evidence of organization. By the act of 1789, people residing in "peculiars," (not within the limits of any town,) were to be taxed for their lands, persons and estates thereupon; State Papers 297. Peculiars were to have officers; State Papers 303.

There was no law prior to 1787 regulating settlements. It has been supposed by some that the acts of 1778, now lost, contained

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some provisions on that subject, but the journals of that year show no such thing.

The acts of 1779 were the only laws on the subject before 1787, and these were mere temporary acts, to continue in force but eight months, and made for the temporary relief of the poor, and are entirely silent on the subject of settlements, and the very titles to the acts show that they had no other meaning, said acts being, with their original orthography, punctuation and capitals, as follows :

"An Act for the ordering and disposing of transient Persons.

"That the Select-men of each respective Town in this State, shall be, and are hereby authorized and impowered, to warn any transient person (residing in such Town, that is not of quiet and peaceable Behaviour, or is in their Opinion, like to chargeable to such Town) to depart out of such Town, except such person does obtain a Vote of the Inhabitants of such Town, in legal Town-Meeting, to remain in such Town; and if any such Person or Persons being so warned, do not leave such Town within Twenty Days after such warning, then one or more of said Select-men, may make Application to an Assistant or Justice of the Peace, who is hereby empowered to issue his Warrant, to the Sheriff or Constable to take such Person or Persons, and transport him or them to the next Town towards the Place where such Person was last an Inhabitant, in the same Manner to be transported to the Place where such Person or Persons were Inhabitants last, or in the same Way out of this State, if he be not an Inhabitant thereof, and all such Expence shall be paid by the Person or Persons so warned, if of Ability, but if he is not of Ability to be paid by such Town,

"Provided always That no Person shall be subject to such Warning after he or she has lived in such Town one Year.

"That if any transient Person or Persons, shall be taken sick or lame in any Town in this State, whoever shall keep any such Person or Persons, (if such transient, sick or lame Person or Persons be not of sufficient Ability,) shall defray such Expence, until complaint thereof be by him made to to the Select-men of such Town after which such Select-men shall provide for such transient, sick or lame Person according to law."—ACTS OF 1779, 25.

"An Act for maintaining and supporting the Poor.

"That each Town in this State shall take Care of, support and maintain their own Poor.

"AND that if any Person or Persons, shall come to live in any Town in this State, and be there received and entertained by the Space of Twelve Months; and if by Sickness, Lameness, or the Like, he or they come to want Relief, every such Person or Persons, shall be provided for by that Town wherein he or they were so long entertained at said Town's own proper Cost and Charge, unless such Person or Persons by Law are to be provided for by some particular Person or Persons; or unless such Person or Persons wanting Relief have within the said Twelve Months, been warned as the Law directs, to depart and leave the Place; And if such Warning be given, and the same be certified to the next Superior Court, to be held in the same County, the said Court shall and may otherwise order the defraying of the charge arising about such indigent Person or Persons."—ACTS OF 1779, 97 & 8.

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These acts were declared to be temporary, and to remain in force until the rising of the general assembly in October following, (8 months.)

These acts, being temporary, have no effect in fixing a settlement; indeed the word settlement was not used in them, and the spirit and intent of these acts, clearly show that nothing was intended but to make temporary provision for the poor.

No trial was provided for before moving a person, and no appeal was allowed; there was no tribunal to settle the question between the towns, or before whom any question could be settled, nor had the person thus removed any opportunity even to protest against the proceeding, the selectmen ordered him to go, and if he neglected, without notice to him, any magistrate applied to issued a warrant, and ordered his removal, not to the place where he had been entertained "by the space of twelve months," but to the place where he was last an inhabitant.

The acts of the February session, 1779, only continued in force until the next October, while those of the June session of 1779, were continued in force until 1787. State Papers 388, 391, 397, 421, 444, 467, 482, 496, 504, 510.

There was no law in force in relation to paupers, after E. Hathorn, senior, moved to Reading in 1781, until 1787, and hence the charge was wrong in relation to his residence.

It was error to charge that a derivative settlement could be obtained at all before 1787. There was no statute upon that subject until that time. There certainly is no common law sanctioning it, and the English statutes make no mention of it, at least until since the 14th of Charles II., although the English courts held, that a man's family residing with him, whether of age or not, had his settlement. 12 Richard II., chap. 7, enacted that the poor were to repair, in order to be maintained, to the place where they were born. By 11 Henry VII., chap. 2, they were to repair to the place where they last dwelled, or were best known, or were born. By 19 Henry VII., chap. 12, they were to repair to the place where they were born, or made last their abode by the space of three years. By the act of 1 Edward VI., chap. 3, this was explained to be where they had been most conversant by the space of three years. By 1 James I., chap. 7, they were to be sent to the place of their dwell-

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ling, if they had any, if not to the place where they last dwelt by the space of one year; if that could not be known, then to the place of their birth. This continued to the 13th and 14th of Charles II, which reduced the term of one year to forty days. 3 Burn's Justice.

While a child was within the years of nurture, (under seven years old,) he could not gain a settlement in his own right, but after that he could gain a settlement in his own right by a residence of forty days, under an indenture. 3 Burn's Justice 586.

It was necessary that the son reside with the father to take the father's settlement. *Bugden v. Amphill*, Bur. S. C. 270. 2 Bott. 66. *Barton Turse v. Happisburg*, Bur. S. C. 49. *Halifax v. Warley*, 3 Burn's Just. 592. *East Woodbury v. West Woodbury*, 3 Burn's 589. *King v. Sowerby*, 2 East 276. *King v. Cowhoney born*, 10 East 88.

The ancient rule of law was that birth gave a settlement. *Rickmensworth v. St. Giles*, 3 Burn's Just. 583. *Cripplegate v. St. Saviours*, 3 Burn's Just. 584. *Rez v. Heaton Norvis*, 5 Geo. 1.

But if he had a derivative settlement from the elder E. Hathorn, we insist he could not transmit it to his daughter thirty years after he left this state. A settlement out of the state was regarded by the statutes up to 1801. State Papers 303, 315.

Butler & Knowlton and *H. E. Stoughton* for the plaintiffs.

One year's residence between 1779 and 1787 was sufficient to give a legal settlement. See Slade's State Papers 378-9, and forward. See also *Corinth v. Newbury*, 13 Vt. 496.

During this period of time, and up to 1817, the common law relative to derivative settlements was in force. *Wells v. Westhaven*, 5 Vt. 322. Slade's State Papers 450.

At common law, the settlement of the father is communicated to the minor children born out of the state, (*Freetown v. Taunton*, 16 Mass. 52,) even though they were children by a second wife whom he married out of the state; *Cambridge v. Lexington*, 1 Pick. 505. And the original settlement from which a pauper's may be derived, will be communicated to all posterity, unless another settlement is gained in some town in the state. *Bridgewater v. Bridgewater*, 9 Pick. 55. These cases all arose prior to 1767,

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up to which period the common law, relative to derivative settlements was in force in Massachusetts. *Freetown v. Taunton*, 16 Mass. 52.

The common law as to derivative settlement, prevailed in New Hampshire up to 1796, and it was held, (*Landoff v. Atkinson*, 8 N. H. 532,) that a settlement, once gained could not be lost except by gaining another settlement in some other town in the state. Such settlement is not affected by gaining a settlement in another state, and the right of settlement would be transmitted to children born in such other state, so as to avail to them on their return.—*Id.*

Statements of the pauper's father are admissible upon the question of pedigree. 1 Green. Ev. § 103, 104. *Waldron v. Tuttle*, 4 N. H. 371. And it is no objection that it is hearsay upon hearsay, provided all the declarations are within the family. 1 Green. Ev. 120, note.

The jury were properly instructed as to the evidence from which they might presume the organization of the town of Reading.

The opinion of the court was delivered by

ISHAM, J. This is an appeal from the order of removal of one Maria B. Hathorn, a pauper, from the town of Londonderry to the town of Andover. The pauper was the daughter of Eleazer Hathorn, jr., and the grand-daughter of Eleazer Hathorn, sen. It appears from the case that the pauper was born in the state of New Hampshire, in 1818, and that she resided in that state in her father's family until 1825, when she removed with her father and his family to Springfield, in this state, and soon after to Andover, where her father died in 1826. It also appears that the pauper continued to reside in Andover with her mother until 1846, when they removed to Londonderry, from which place this order of removal was made. The general question in the case arises, whether the town of Andover is the place of the pauper's legal settlement. It is conceded that the pauper, after she had arrived at full age, resided in the town of Andover sufficient time to gain a settlement in her own right, provided she had a previous settlement in any other town in this state. As the pauper was born in New Hampshire, and had not acquired a settlement in this state in her own right, it became necessary for the town of Londonderry to show that her

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father had had such a settlement, and that his settlement was communicated to the pauper. In that event, the pauper, by her residence in Andover, would have acquired a legal settlement in that town; otherwise, the town of Andover is not chargeable.

On the question as to the residence of Eleazer Hathorn, jr., the father of the pauper, in this state, testimony was offered tending to prove that Eleazer Hathorn, sen. removed from New Hampshire to Reading, in this state, with his son, then 19 years of age, about the year 1781; and that after that period, he resided in different places in Reading for several years before 1787, when he removed to New Hampshire. Upon those facts, the court charged the jury that if they found that Eleazer Hathorn, senior, resided and made it his home one full year continuously in Reading, between the years 1779 and 1787, and before Eleazer Hathorn, jr., the pauper's father, became of age, that he thereby obtained a legal settlement in that place, and that Eleazer, jr. thereby also obtained a derivative settlement from him in that town; or if the jury should find that Eleazer jr. resided in Reading after full age, one full year continuously, and made it his home there, between the years 1779 and 1787, that he gained a legal settlement in that town *in his own right*. To this charge of the court several objections have been taken by the defendants. In the first place it is insisted that competent evidence was not introduced, showing the existence and organization of the town of Reading at that period. The court charged the jury that as it appeared from their records that as early as 1781, the town had appointed their officers, and were conducting their affairs as an organized town, the jury might presume the town was legally organized. We see no objection to that charge of the court. Towns are *quasi corporations*, and it is not necessary for this purpose to show a strictly legal organization. It is sufficient that the town was organized *de facto*. The appointment of listers, a town clerk, with other town officers, and the fact that they were then exercising those corporate rights and powers belonging to organized towns, was sufficient *prima facie* proof of their due organization, and sufficient to cast the burden of proof on the town of Andover to show it otherwise. It has been held in several instances that testimony of that character was sufficient to show the due organization of corporations of a more private char-

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acter, and in cases where the parties would be held to more strict and technical proof; *Searsburgh T. Co. v. Outler*, 6 Vt. 315; *Bank of Manchester v. Allen*, 11 Vt. 303.

It is also insisted that the court erred in their charge to the jury, in saying that a legal settlement could be obtained in Reading, previous to the year 1787, and particularly, that a derivative settlement could be communicated to the father of this pauper under the law of this state then in existence. But we think the instruction of the court to the jury on that subject, was correct. It is true that the act of 1779 has particular reference, in its provisions, to transient poor, and directs the manner in which they shall be removed to the place they last inhabited. It is also true that that statute was temporary, but it was by successive acts continued in existence and in life until 1787, when more general and permanent provisions in relation to settlements were enacted. Under the act of 1779, it was provided that no person could be warned or removed from any town in this state, after he had lived in that town for the period of one year. The case of *Corinth v. Newbury*, 13 Vt. 496, has placed a construction upon that act, which we think must be conclusive upon us. In that case, the pauper was removed from Corinth to Newbury, and Newbury was held chargeable under the act of 1779, by the residence of the pauper in that town for one year previous to 1787. It was only upon the ground that a settlement was gained in Newbury under the act of 1779, by a residence of one year in that town, that the order of removal in that case was sustained. The question must be regarded as settled by that case, that a legal settlement could be gained in any town in this state, previous to 1787, and under the act of 1779, The court were therefore correct in their charge to the jury, that Eleazer Hathorn, senior, obtained a legal settlement in Reading, if between 1779 and 1787, he resided in that town, as his home, continuously, for the period of one year. In that event, the doctrine is fully established by the authorities that Eleazer Hathorn, jr., the father of this pauper, obtained a derivative settlement in Reading from the settlement of his father in that town. The case of *Wells v. Westhaven*, 5 Vt. 322 seems to be decisive on this subject. The right of a derivative settlement, by the father of this pauper, was not lost for the want of express statutory provisions on the subject

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of derivative settlements, as that right is made to rest on general principles. It was observed by Justice WILLIAMS, in the case last cited, that "the law in relation to derivative settlements depends upon the principles of the common law, and not on any statute regulations, and that the decisions in England are authorities upon any question on that subject arising previous to 1817." This subject, in relation to derivative settlements, was fully considered, and the doctrine, as held in the case of *Wells v. Westhaven*, was sustained in the House of Lords, in England in the late case of *Adamson v. Barbour*, 28 Eng. L. & Eq. 38. The same doctrine is sustained in other states; *Freetown v. Taunton*, 16 Mass. 52; *Landaff v. Atkinson*, 8 N. H. 534; Reeve. Dom. Rel. 298. We come to the conclusion, therefore, that Eleazer Hathorn, jr., the pauper's father, had a derivative settlement from his father in Reading, under the act of 1779, provided, during his minority, his father resided in that town one full year previous to 1787; and also, that he obtained a settlement under that act, *in his own right*, if, after he became of age, he resided in that town for one year previous to that time.

But it is insisted, that if the father of this pauper obtained a settlement in Reading, either derivative or in his own right, that settlement was lost and abandoned by his removal from this state to New Hampshire, soon after 1787, and his residence in that state until 1825, and that, under such circumstances, he could not communicate a derivative settlement to the pauper, who was born in that state. This objection seems to be met mainly by decisions in this state. In the case of *Wells v. Westhaven*, it was observed, that "if a father gains a settlement in this state for himself, it is communicated to his minor children, whether living with him or not;" and in *Georgia v. Grand Isle*, 1 Vt. 470, it was held, "that a settlement once obtained in this state, was not lost by the subsequent acquisition of a settlement in another state." It results, from that case, that a derivative settlement can be communicated by a father having such a settlement to his minor children, though born in another state, if the father, during their minority, remove with them into this state. The cases in Massachusetts sustain that doctrine; *Townsend v. Bellinica*, 10 Mass. 411; *Canton v. Bentley*, 11 Mass. 441; *Cambridge v. Lexington*, 1 Pick. 509. A differ-

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ent rule would probably apply to children born in a foreign country of parents domiciled there, though the father may have had a settlement in this state, and when the father, during their minority, never returned to this state. Such children would be, in every sense of the word, aliens, owing no allegiance to this country, but would be under a natural allegiance to the country in which they were born. It can be said, with much propriety, that when that relation to this country ceases, the party is deprived of communicating to children so born, a derivative settlement. But however that may be, we think the pauper, in this case, obtained a derivative settlement in this state, if her father had obtained a previous one in Reading; and that depends upon his actual residence in that town for one year after he became of age, or upon the actual residence of Eleazer, senior, in that town for the same period, during the minority of Eleazer, jr.

The jury, under the charge of the court, have found that an actual residence of that character was had by one or the other of those persons. In either event the result will be the same. The father of this pauper would have a derivative settlement in the one case, or a settlement in his own right in the other; and the place of his settlement, would be the legal settlement of this pauper, but for the circumstance that she has, by her residence in Andover, subsequently acquired a settlement in that town. The important and remaining inquiry in the case then arises, whether that finding of the jury as to the actual residence of Eleazer, senior, and Eleazer, junior, in Reading, previous to 1787, was had on competent and legal testimony. If it was, that finding of the jury is conclusive, and the residence of the pauper in Andover will give her a settlement in that town, as she had a previous one communicated to her by the settlement of her father in Reading. To prove the actual residence of the pauper's father in Reading, and also that of Eleazer, senior, the depositions of several witnesses were offered, and read in evidence to the jury. In relation to all of them, with one exception, it may be observed that they refer simply to the declarations of Eleazer, Jr., as to his former residence, and that also of his father, Eleazer, senior, in Reading, and made many years afterwards; and also to the declarations of other members of the family, as to the residence of those persons

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in that town. If those declarations had been made by him, during his residence there, perhaps they might have been competent evidence, as they might be considered part of the *res gestae*, explaining the character of his residence, whether temporary or permanent. But when such declarations are not cotemporaneous with the fact to be proved, we know of no principle that will admit them as evidence in the case. *Baptiste v. Vourburn*, 5 Har. & John. 86. 1 Greenl. Ev. § 108. *Gorham v. Canton*, 5 Greenl. 266. The actual residence of those persons in Reading, between the years 1779 and 1787, cannot be proved by reputation or family tradition for the purpose of creating a legal settlement. Testimony of that character has been received to show the relationship of individuals, the pedigree of families, and in some other cases where it is the interest of the family to preserve a knowledge of the facts to be proved; 1 Greenl. Ev. § 111; *Ward v. Oxford*, 8 Pick. 477; but we do not find that it has ever been extended to cases of this character. The admission of that testimony cannot be urged on the ground that it was competent in proof of the identity of the parties, as the exceptions state that the testimony was offered and received to prove the residence of those persons in Reading, and for that purpose alone they were admitted by the court. We think the testimony for that purpose ought not to have been received.

The result is that the judgment of the county court is reversed and the case remanded:

JABEZ HILL v. ASA WENTWORTH, JR.*Fixtures.*

Not only the manner and extent, but the object and purpose of the annexation of a chattel to a building, is to be considered in determining whether it has become a fixture and part of the realty.

That the article is essential to the use of the building for the business for which it is used, is not the test by which to determine whether or not it is a part of the realty.

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To change the character of an article from a chattel to a fixture there should be some positive act and intent to that effect, on the part of the person annexing it to a building; and, if the intent is left in doubt upon an inspection of the property itself, taking into consideration its nature, the mode, extent, purpose and object of its annexation, it should be held to remain personal property.

Articles of machinery used in a manufactory do not become a part of the freehold when they are only attached to the building for the purpose of keeping them steadier, and in a manner best adapted to that purpose, so that their use as chattels may be more beneficial, and are attached in such a way that they may be removed without injury to the freehold or to the articles themselves as chattels.

An iron boiler, in a paper-mill, set in brick-work which was laid on a stone foundation placed in the ground up to which the floor was laid, together with the iron pipe connected with it by screws and bolts; engines for grinding rags, fixed in tubs standing on timbers up to which the floors of the building were scribed;—paper presses fastened to the building by cleats and with screws and nuts; calendar rolls in an iron frame screwed to timbers which were spiked to the floor;—a rag-outer;—a trimming-press set in a frame which was screwed to the floor, and a machine for making paper, which was fastened to the floor by cleats nailed around it and in no other way, held to be no part of the real estate, as between mortgagor and mortgagee;—but otherwise of the iron shafting put up in the building by hangers of iron bolted to the beams and sills, and used for turning and carrying the machinery.

TROVER for a quantity of iron. Plea, the general issue; trial by jury, April Term, 1855,—UNDERWOOD, J., presiding.

The plaintiff, to support the issue on his part, put into the case two mortgage deeds from James I. Cutler, Henry Green and Alexander Fleming, to the plaintiff, of certain lands therein described, and among the rest of a paper-mill; also a decree of foreclosure of said mortgages in September, 1846, in which the time of redemption was limited to the 7th of October, 1847.

One of the mortgage deeds above referred to, and upon which the decree was founded, contained among other things, in the description of the estate mortgaged, the following: "also the paper-mill, dry-house and size-house, situated at Bellows Falls, now used and improved for making paper, together with the land on which said paper-mill, dry-house and size-house are situated."

The plaintiff's evidence tended to show that sometime after the execution of said mortgages, the paper-mill building was taken down and another building substituted in the same place, and fitted up for manufacturing paper, with fixtures and machinery, and occupied by the mortgagors for manufacturing paper as before. The plaintiff's evidence further tended to show that an iron boiler was fitted up in said building, near the centre, in brick-work laid on a

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stone foundation placed on the ground, and that the floor of the building was laid up to it, but was attached to the building in no other manner; that four engines for grinding rags into pulp, fixed in large oval tubs, in the usual way, were fitted up in the building, the tubs standing on timbers, and the floor of the building scribed up to them, which were attached to the building in no other way, saving that they were carried and operated by a band from shafting hereafter named, which carried the machinery: and that there were five paper presses with screws of iron, the lower ends of which dropped through the floor to the ground, and were in no other way attached to the floor, and their upper ends surrounded by cleats nailed to the floor over head, to keep them in place, which, by taking off some iron nuts, could be taken out without injuring or disturbing the building; four calender rolls, placed in an upright iron frame, the frame standing on timbers spiked to the floor, and the toes of the frame screwed to the timbers; a rag-cutter put into a wooden frame, which stood on the floor, and was in no other way confined; a trimming press, set in a frame about the size of a four-foot table and screwed to the floor; a machine for making paper, which stood upon the floor, and was in no way fastened to the building, except by cleats nailed round it to the floor; iron pipes connected with the boiler by screws and bolts, which could be easily taken off, and iron shafting put up in the building for turning and carrying the machinery, by hangers of iron bolted to the beams and sills, which could be taken down by unscrewing the bolts.

The testimony further tended to show that these fixtures and machinery were composed of iron in various conditions, (in part,) such as screws, hoops, rollers, gudgeons, spikes, &c., &c., and were put up by said mortgagors, and were necessary and usual for manufacturing paper in paper-mills, and designed to be used there permanently for manufacturing paper, except as they might be repaired as occasion required; and that on the 13th of July, 1846, and before the plaintiff had taken possession of the premises, said paper-mill, fixtures and machinery were consumed by fire, leaving all the irons of said fixtures, machinery and the building, scattered about in the ruins, in which situation, it appeared, the iron was collected and deposited in a building by direction of the mortgagors,

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and the defendant, who was their creditor, caused them to be attached on a writ against said mortgagors, and to be sold on his execution, except a portion which he sold at private sale, by consent of the mortgagors; and this iron so sold was the same contained and named in the declaration. There was no evidence to show the plaintiff had any other title to said property, than by virtue of said mortgages. The sale was made before the time of redemption in said decree had expired, and before the plaintiff took possession of the premises.

The defendant requested the court to charge the jury that said machinery and fixtures were personal property, and did not pass by the deeds, and that, therefore, the plaintiff was not entitled to recover for any portion of the iron composing them. The court refused to charge as requested, but did charge, substantially, that such of said machinery and fixtures detailed in the testimony as were placed and used there by the mortgagors, and designed to be and remain there permanently, being necessary and usual for manufacturing paper, and were in any way fixed to the building, whether by nails, screws, spikes or cleats, or were made to stand upon the ground or timbers with the floor built up to them, and within the main building, were to be regarded a part and parcel of the paper-mill and of the realty, and would pass by virtue of said mortgages; and that, whatever of the iron sued for, the jury should find composed said fixtures or machinery detailed in the testimony, in whole or in part, for that the plaintiff should recover.

Exceptions by the defendant.

H. E. Stoughton for the defendant.

To constitute fixtures, it is requisite that the articles be actually affixed or annexed to the realty, and so firmly that they cannot be removed without actual injury to the freehold by the removal, apart from the abstraction of the thing removed; and whether personal property or fixtures must be determinable by inspection of the property itself, considering the use, nature and intention of the party annexing it. *Fawn v. Stackpole*, 6 Greenl. 154; *Teaff v. Hewett*, (Ohio Sup. Court,) reported in Law Reg. for 1853; *Swift v. Thompson*, 9 Conn. 68; *Gale v. Ward*, 14 Mass. 352; *Oresson v. Stout*, 17 Johns. 116; *Walker v. Sherman*, 20 Wend. 686; *Far-*

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rer v. Chauffute, 5 Denio 527; *Taffe v. Warwick*, 3 Blackf. 111; *Line v. Billamy*, 12 N. H. 205; *Tobias v. Francis*, 3 Vt. 425; *Sturgis v. Warren*, 11 Vt. 433.

D. & G. B. Kellogg for the plaintiff.

The conveyance of a "paper-mill, dry-house and size-house," conveys that which is necessary to the carrying on of the paper-making business. Steam engines, boilers, bands, gearing, stoves set in brick, &c., pass with the freehold; *Winslow v. Insurance Co.*, 4 Met. 306; 6 Greenl. 155; *Nolle v. Bosworth*, 19 Pick. 314; 15 Mass. 159; 7 Mass. 432.

There is a wide distinction between landlord and tenant and mortgagor and mortgagee, which is well defined in 4 Met. 306.

A mortgage will embrace all fixtures, unless, by its terms, it was the intention of the parties not to embrace them. 15 Mass. 159; 2 B. & C. 76.

The opinion of the court was delivered by

BENNETT, J. This is a case of very considerable practical importance, and we have endeavored to give it the attention which its importance demands. The charge assumes that, if the machinery in the mill was necessary and usual for the purpose of manufacturing paper, and designed to be and remain in the mill permanently, it became a part of the realty, however slightly it may have been attached to the freehold. There are, no doubt, cases in the books, which will fully warrant the charge of the court, and of that character is the case of *Farrar v. Stackpole*, 6 Greenleaf 157, to which we have been referred, (and which seems to be an extreme case,) while others take an opposite view, and hold that the *annexation* must be substantial, and such that the chattel cannot be severed without substantial injury to the freehold, beyond what shall result from an abstraction of the thing removed. The first inquiry should be, what has been the tendency of our own decisions in relation to the matter?

In *Wetherby v. Foster*, 5 Vt. 136, it was held that potash kettles, set in brick arches, in the usual manner, with chimneys to the arches, and used for manufacturing purposes, still remained personal property. The court said, p. 142, if the kettles were fastened

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to the freehold at all, it was temporary merely, and the injury to the brick-work, in taking them out, *was too trifling to designate them real estate while there.* In *Tobias v. Francis*, 3 Vt. 425, the question arose between the mortgagee and a creditor of the mortgagor, and it was held that carding machines, in a woolen factory, and connected by a band with other wheels in motion, by which they were propelled in the usual way, and which remained stationary by means of their own weight, were still personal property, and, as such, might be attached and taken away.

In *Sturgis v. Warren*, 11 Vt. 433, the question also arose between the creditors of the mortgagors and the assignee of the mortgagee, and the carding machines were affixed to the factory building in the usual manner, *some with nails, some with spikes and screws, and some with cleats*, and yet, upon the authority of the case of *Tobias v. Francis*, they were held to be personal property. In *Cross v. Marston*, 17 Vt. 534, the case of drawers, and the sash case, were placed in a building which was fitting up for a book store. The case of drawers was nailed to the wall, and open shelves were placed in the space above. The sash of the show-case was used to cover an open book-case, which was permanently fastened to the wall of the building,—the sash sliding in a place before the book-case, and being fastened in by strips of boards nailed above and below. The question arose between vendor and vendee, and the case was made to turn on the question whether the chattels had, by the manner of their *annexation* to the freehold, lost their *personal identity as chattels*, and it was held they had not, the court applying, *as the test*, the fact that the articles could have been taken out of the building without injury to themselves, or the building, which was assumed both by the counsel and the court, although, from the report of the case, I do not see that it was a fact distinctly found in the bill of exceptions. From the cases already decided in this state, upon a subject which, from its very nature, is perplexing, and rendered more so by the conflicting views of different courts, it is quite evident our courts have assumed the ground that a chattel is not to lose its personal identity, as such, unless it has been substantially annexed to the freehold, in a manner which would not permit it to be separated from it, without material injury to itself or to the freehold. We apprehend

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there is no sufficient reason why we should, at the present day, recede from the ground already taken by our courts. It is certainly sustained by many well considered cases.

In *Swift v. Thompson*, 9 Conn. 63, the spinning frames in a cotton factory stood upon the floor, and were kept in their place by means of cleats nailed to the floor around them, and there was other machinery, to the posts of which iron plates were attached, through which wood screws passed, fastening them into the floor, but by unscrewing them the machinery could be removed without injury to it or the building, and it was held that the whole machinery remained personal property. DAGGETT, J., says it is material to consider that the machinery was thus attached to the building to render it stable, and that the criterion established by the rules of the common law is, *could this property be removed without injury to the freehold?* See also *Taffe v. Warwick*, 3 Blackford 111. The New York cases are very full on this point. *Cresson v. Stout*, 17 Johnson 116; *Walker v. Sherman*, 20 Wend. 636; *Farrar v. Chauffetete*, 5 Denio 527, and *Vanderpool v. Van Allen*, 10 Barbour 157. So in a recent case in Ohio, *Teafft v. Hewett et al.*, 1 Ohio N. S. 5-11, where the subject was examined at great length, and with ability, it was held that the machinery in a woolen factory, connected with the motive power of the steam engine by bands and straps, and only attached to the building by cleats or other means to confine it to its proper place for use, and could be removed without injury, was but chattel property. The case of *Gale v. Ward*, 14 Mass. 352, in its facts, is much like the case of *Tobias v. Francis*, in our own reports. In that case, PARKER, CH. J., says, *though in some sense attached to the freehold, yet they (the machines) could easily be disconnected, and used in buildings erected for similar purposes.*

Upon the subject of fixtures, in the English law, the case of *Elwes v. Mawe*, 8 East 38, and reprinted in Smith's Leading Cases, may well be considered *the leading case*. In that case, and in the notes to it by Mr. Smith, and the American editor, most of the law on that subject is collected.

In a case decided in the Court of Exchequer, in 1851, *Hollawell v. Eastwood*, 6 Welsby, Hurlstone & Gordon 295, it was held that machinery, consisting of certain cotton spinning-machines,

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some of which were fixed by screws to the wooden floor, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead poured into them, were still personal property. B. PARK said the only question was, whether the machines, when fixed, were a parcel of the freehold, and this was a question of fact, depending on the circumstances of each case, and principally on the two considerations; first, the mode of annexation to the soil or fabric of the house, and the *extent* to which it was united to them, whether it could be easily removed without injury to itself or the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, or merely for a temporary purpose, or the more complete enjoyment and use of it *as a chattel*.

He added, we cannot doubt that the machines never became a part of the freehold. They were attached slightly, so as to be capable of removal, without the least injury to the fabric of the building, or to themselves; and the object and purpose of the annexation was not to *improve the inheritance*, but merely to render the machines steadier and more capable of convenient use, *as chattels*. In that case, it is true, the question arose between landlord and tenant, and in such a case, it is said in the English law, the greatest indulgence is shown to the tenant, where the annexations are made for the purposes of trade or manufactures. No doubt in England, in relation to fixtures, different rules have been held to prevail; and between heir and executor, a strict rule has been adopted, and the same rule seems to have prevailed between vendor and vendee, and between mortgagor and mortgagee; and the English cases show that there is no relaxation of the rule, as applied in these latter cases, even between landlord and tenant, where the erections are made *solely for the purposes of agriculture*, although beneficial and important in improving the occupancy of the estate. We apprehend that much of the confusion in the authorities upon the subject of fixtures, may have had its origin in the fact that different rules have been attempted to be applied to different relations, and these different relations have sometimes been lost sight of.

It is said by COLLAMER, J., in *Sturgis v. Warren*, 11 Vt., that

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"in this state, and especially under our attachment law, it is difficult to recognize any such distinctions."

In *Dubois v. Shelley et al.*, 10 Barb. 496, it was held the same rule should be applied, as to fixtures, whether the erections were for agricultural and other purposes, or for the purposes of trade, and between landlord and tenant.

In *Van Ness v. Pacard*, 2 Peter's U. S. R. 145, it is strongly intimated that, in this country, there should be no different rule applied, whether the erections were made for *the purposes of trade and manufactures*, or purely for *agricultural purposes*.

We think the rule in this state should be that the various articles of machinery belonging to a manufactory are, in no respect, real estate, excepting as they are a part of the freehold, or substantially attached to it, and that it is not sufficient to make them a part of the freehold if they are attached to the building for the purpose, and in the manner adapted to keep them steady, and that their use may be more beneficial as chattels, and in such a way that will admit of their removal without any material injury to the freehold, or to the chattels. Neither is it enough to make them real estate that they are essential to the occupation of the building for the business carried on in it. In the construction of a building, many things, which in themselves are chattels, as doors, window-blinds, shutters, &c., become a part of the building, and, in such cases, the manner of annexation is of no particular importance. But to make the *test*, whether fixture or no fixture, to be found in the relation which the chattel bears to the use of the freehold, is, to us, unwise, and against well considered cases. The rule requiring *actual annexation*, is not affected by those cases where a *constructive annexation* has been held sufficient. Those cases may be regarded as exceptions to the general rule, or else as cases where the *things* were *mere incidents* to the freehold, and became a part of it, and passed with it, upon a principle different from that of its being a fixture.

In determining the character of what the plaintiff claims to be *fixtures*, or a part of the realty, we must not only have reference to the manner and extent of the annexation, but also to the *object* and *purpose* of it. Whether the articles in question were personal

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property, or *fixtures*, should be determinable, and plainly appear, from an inspection of the property itself, taking into consideration their *nature*, the *mode* and *extent* of their *annexation*, and their purpose and object, from which the *intention* would be indicated.

To change the nature and legal qualities of a chattel into a *fixture*, requires a positive act on the part of the person making the annexation, and, his intention so to do, should positively appear, and, if this be left in doubt, the article should be held still to be personal property.

We see no reason why the case of the potash kettles, in 5 Vt., should not govern this, as to the iron boiler. It was set in a brick-work, resting upon a stone foundation placed upon the ground, and the floor of the building was simply laid up to it, and it was in no other way attached to the building. So in *Hunt v. Mulanphy*, 1 Missouri 508, a kettle and boilers put up in a tannery, with brick and mortar, was held not to be a fixture. See also *Reynolds v. Shuler*, 5 Cowen 323, and *Raymond v. White* 7 Cowen 319, which was the case of a heater used for applying heat to tanners' bark, in vats and leaches.

We think the four engines, used for grinding rags into pulp, cannot be regarded as a part of the paper-mill, or as annexed to it, so as to become a part of the realty. These were fixed in large oval tubs, in the usual way, the tubs standing on timbers, and the floor of the building scribed up to them, and the engines were carried and operated by means of a band connecting them with the iron shafting, from which was communicated to the engines their *motive power*. There can be no ground to claim that the tubs, in which they stood, were a part of the realty, and the band was used to give the engines motion, and not for fastening them to the freehold. It could be slipped off, and put on, to give them motion, or arrest it, at the will of the operator, and they could be removed without injury to the building, or the engines. The case of *Winslow v. Merchants' Insurance Company*, 4 Met. 306, where it was held that a steam engine and boilers, and the machines for working iron, upon which they operated, were fixtures, and a part of the realty, is expressly put, so far as relates to the machines for working iron, upon the manner in which they were *fitted and adapted to the mill*. The words "fitted and adapted to the mill," seem to

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imply something more than being set down upon the floor, and fastened for convenient use, but rather a peculiar adaptation and fitting to that particular location and mill. The building was a machine shop, and the steam engine furnished the *motive power* which moved the whole machinery in the several stories of the building, by means of connecting bands or otherwise. In regard to the case of *Gale v. Ward*, 14 Mass., CH. J. SHAW, in 4 Metcalf, observed, "we do not think that an authority opposed to this opinion, because it is manifest that the court, in that case, regarded the carding machines, though ponderous and bulky, as essentially personal property, which might have been attached and removed as the personal property of the owner, even though there had been no mortgage, and they had been erected by the owner in his own mill, for his own use." Besides, so far as the steam engine is concerned, it may be said of the case in 4 Metcalf, it furnished the *motive power* for the whole building, and may be regarded as an appurtenant to the machine shop, as much so as the water power of a grist-mill, or a paper-mill. The paper presses were kept in their places by means of cleats at the top, nailed to the floor, and at the bottom by iron screws, and by taking off the iron nuts they could be removed without injuring or disturbing the building.

In regard to the iron frame, in which the calender rolls stood, it seems that was simply kept in place by means of screws at the toes of the frame, connecting it with timbers upon which it stood, and the timbers made fast to the floor by means of spikes. This could be easily removed by unscrewing the toes of the frame. The rag-cutter, stood in a wooden frame, standing on the floor, and was not otherwise confined.

The trimming press was set also in a frame, and this only screwed to the floor.

The machine for making paper was kept in place by means of cleats around it, nailed to the floor, and not otherwise fastened to the building. If we regard the iron boiler as personal property, most clearly the iron pipes connected with it only by screws and bolts, which the case says could be easily taken off, should be regarded in the same light.

The iron shafting put up in the building for the purpose of turning and putting in motion the machinery, by means of hangers of

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iron bolted to the beams and sills of the building, we are disposed to regard as a constituent part of the mill. The shafting was necessary to communicate the *motive power* to the machinery, and should be regarded as a part of the mill, as much as a water-wheel, by which a water-power is called into existence.

Though the paper-mill was placed upon the premises subsequent to the execution of the mortgage, yet it would enure to the benefit of the mortgagee, and also carry with it all that can be regarded as incident to, or a component part of the mill, but the machinery and articles which the mortgagors placed in the building, to be used by them in their business as manufacturers of paper, and not permanently attached to the building or freehold in such a manner that they could not well be removed without material injury to the chattel or freehold, did not lose their personal identity as chattels, and become a part of the realty. This, we think, has long been the views of our courts upon this subject.

The result will be that, so far as the irons in question either constituted the whole, or were a part of the machinery of *such a description and character*, they remained the personal property of the mortgagors, after the fire, the same as the machinery was before the fire, and the plaintiff's right of recovery should have been limited at least to the value of the iron which was used in the construction of the building, such as nails, spikes, &c., and the iron shafting used for the purpose of putting and keeping the machinery in motion, and such iron, if any, as was permanently fixed or fastened to the building so as to be annexed to and become a part of the realty, according to the foregoing views.

Whether it was of any importance that the plaintiff should have taken the actual possession of these irons, after the fire, so as to perfect and keep good his title, as against the creditors of the mortgagors, is a point not made in the case, and one which we have not considered, and much less decided.

Judgment reversed and cause remanded.

Amidon v. Aiken.

ELIAKIM AMIDON v. JOHN AIKEN.

Practice. Audita querela.

If, upon a trial by jury, all the facts alleged in an insufficient declaration are proved, the court may, in their discretion, allow a verdict for the plaintiff, leaving the defendant to move in arrest of judgment, or at once direct a verdict for the defendant.

The judgment of a justice cannot be set aside by audita querela on account of his having refused to continue the cause when the defendant was sick and unable to attend a trial.

AUDITA QUERELA. The complaint alleged that the defendant sued out his writ of attachment against the complainant, returnable before a justice, which was duly served; that the complainant was taken sick, and was unable to attend the trial before the justice on the return day of said writ; that he appeared by his wife before said justice at the time when said writ was made returnable, and notified the defendant and the justice of the sickness of the complainant, and requested that said trial might be adjourned to a then future time, to enable him to appear and make his defense; but that the defendant, with fraudulent intent, and designing to impose upon said justice, then and there represented that the complainant was not sick, but was well and in the enjoyment of good health; whereupon the justice refused to hear affidavits offered as to his sickness, and rendered judgment for the said Aiken. Plea, the general issue; trial by jury, April Term, 1855,—UNDERWOOD, J., presiding.

It was admitted that the complainant was sick, and unable to attend before the justice at the time of the trial, and that his wife then appeared, and that she notified the defendant and justice of the sickness of the complainant, and offered to make oath to the same; that the defendant and his counsel insisted before the justice that the complainant was not sick, and that the representations of his sickness were made for the purpose of procuring a continuance. It was further admitted that the complainant's wife offered to pay the costs incurred on the return day of the writ, and the costs of a continuance.

The complainant offered no other evidence, whereupon the court decided that the evidence was not sufficient to maintain this action,

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and directed a verdict to be returned for the defendant. Exceptions by the complainant.

A. Stoddard and J. Roberts for the complainant.

H. E. Stoughton and L. A. Grant for the defendant.

The opinion of the court was delivered by

REDFIELD, CH. J. No question is made, in the present case, but that if the proof is insufficient to sustain an action, the court were justified in directing the jury to find for the defendant, notwithstanding the plaintiff might have proved, substantially, all which he alleged in his declaration. By the English practice, the plaintiff, in such case, would be entitled to a verdict, and the defendant be left to his motion in arrest of judgment. But in this state, we have regarded it as resting in the discretion of the court, whether to take a verdict for the party, upon proof of a defective case, or to direct a verdict at once for the defendant; *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114; *Dyer v. Tilton*, 23 Vt. 313.

In regard to the decision of the case upon the merits, we see no reason to question its soundness after the decision in *Sutton v. Tyrrell*, 10 Vt. 87. In that case it was held, that when the justice gave judgment against the defendant upon the ground that his agent, not being a sworn attorney, could not appear for him without a written power, it could not be remedied by this mode of procedure, the question being properly within the cognizance of such justice, and his decision being final, unless appealed from. But in the present case the justice allowed the appearance, and refused to continue the case, upon a false and foolish ground, perhaps. But as the question was obviously one within his exclusive jurisdiction, his decision is not subject to revision in this mode. The attempt to show fraud in the party, falls far short of what is required, to set aside a judgment, by bill in equity, or by *audita querela*. The representations of the plaintiff in the action that the defendant was feigning sickness to procure a delay, is not any different from arguments we sometimes encounter in all courts upon similar motions. It was rather conjecture or speculation, than a false representation, for the justice could not have supposed he knew anything upon the subject. And the fact of his adopting and acting upon it, shows,

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perhaps, his simplicity and weakness ; but those are defects in judicial administration, which cannot be remedied by *audita querela*. Certainly, that is a complaint of a character which the courts of law cannot entertain.

Judgment affirmed.

WILLIAM H. JOY v. JOHN WALKER.

Amendment.

The declaration in an action of account cannot be amended, so as to introduce a new and distinct claim, after the coming in of the report of the auditors, unless the report is first set aside; and if then amended, the defendant may plead *de novo*.

ACCOUNT. The declaration charged the defendant as bailiff of a certain farm of the plaintiff, and of nineteen cows, and nine and a half tons of hay upon the same. At the term when the suit was entered, the defendant filed a declaration on book, in offset, upon which a judgment was rendered at a subsequent term, for a balance of \$ 72.46, reported in his, (the defendant's) favor; and at the same term a judgment to account, was rendered in the original action; and at a still subsequent term, a report was made in favor of the plaintiff, to which the defendant filed exceptions, during the pendency of which, at the April Term, 1855,—UNDERWOOD, J., presiding,—the plaintiff moved for, and obtained leave to amend, and did amend his declaration, so that when amended it charged the defendant as bailiff of the swine and stock upon the premises, and of the grain furnished by the plaintiff for feeding the same, in addition to the property first above mentioned. This motion was resisted, and the decision of the court granting leave, was excepted to by the defendant. After the allowance and making of said amendment, the defendant, by leave, demurred to the declaration as amended, and, upon hearing, the demurrer was sustained. To this allowance and sustaining of the demurrer, the plaintiff except-

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ed. The defendant claimed to recover, upon the judgment rendered in his favor upon the demurrer, the amount recovered by him upon his declaration on book; but the court rendered judgment in favor of the defendant for his costs only, to which the defendant also excepted.

A. Stoddard and *C. K. Field* for the defendant.

The amendment ought not to have been allowed. It introduced a new cause of action; *Emerson v. Wilson*, 11 Vt. 359; *Carpenter v. Gookin*, 2 Vt. 495.

The amendment was offered too late. The declaration cannot be amended after verdict, except in matters of form; 1 Bac. Ab. 248; *Rowell v. Bruce*, 5 N. H. 381; 1 Burr. Prac. 476.

Cases like the present have been repeatedly before the court; but it does not appear ever to have occurred to counsel or the court that items omitted in the declaration, but passed upon by the auditor, could be added by way of amendment.

The amendment operates as an injury to the defendant, and has a tendency to deprive him of the benefit of his offset; 1 Burr. Prac. 476; *Dodge v. Tillotson*, 12 Pick. 328.

To the amended declaration the defendant was entitled to plead *de novo*; 1 Burr. Prac. *ub. sup.*; 12 Pick. 328.

— for the plaintiff.

The court had power to grant the amendment. The amendment neither changed the form of action nor the parties, nor introduced any new cause of action, but was simply more perfectly and definitely describing the plaintiff's cause of action, which was before, perhaps, defectively stated; and to this extent the power of the court has never been questioned.

The amendment furnished no ground for the demurrer. Nor did it operate any injury to the defendant, for all the matters covered by the amendment had been adjudicated upon by the auditor.

The opinion of the court was delivered by

REDFIELD, CH. J. We think it very obvious, in the present case, that if the amendment was allowed properly, it did entitle the other party to plead anew to the amended count. And the conse-

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quence will be that the report should be set aside, and the trial begin anew from the point of the amendment. For the amendment was certainly material; and did introduce a new and distinct claim, not before described in the declaration, or was evidently intended to do so. It was a claim which the defendant had had no opportunity to answer, and upon which no judgment to account had passed, and which had not been referred to the auditor, and which the defendant might have omitted to defend against, upon that ground.

This being the necessary result of allowing such an amendment at this stage of the proceedings, we think it not competent to allow it until the report is set aside, and all the proceedings subsequent to the declaration swept away. It is certain no such course was ever dreamed of, in practice, in this state before. For if this mode of making the declaration conform to a report in the action of account could avail, the decisions which we have made upon the subject, setting aside reports, after great expense in litigation, because it was of matter not embraced in the declaration, might have been much more readily remedied. Amendments in New York, in matters of variance, are made after verdict; and so in the English practice. But in both cases, I think, upon examination, it will be found to be done by statutes specially providing for such amendments. But whether that be so or not, it is very different from allowing an amendment introducing a new class of claims, not attempted to be described in the original declaration. And although we regard the amendment as competent to be made, before the case went to the auditor; yet, after the report, it clearly could not be done unless the report was set aside.

We have decided the party cannot then become non-suit, because the matter is then fixed, and as much beyond the control of the party, as after judgment; *Lyon v. Adams*, 24 Vt. 268.

The rule in regard to amendments, in the court of chancery, is perfectly well settled. The orator cannot amend his bill after the parties are at issue, unless, by permission of the court, the replication is withdrawn. If an amendment is then made, as it sometimes is, even after testimony is taken, the defendant is at liberty to plead, answer or demur, and the issue is to be tried anew, the same as if nothing had been done, and the defendant may insist

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upon having all the witnesses examined anew. We think the same rule, substantially, is applicable to cases at law. After issue joined, if the party have leave to amend, all that has been done in the case goes for nothing. And if the court allow an amendment in the declaration in important points, retaining the verdict, or report of auditors, where the amendment is of a character to change the course of the defense, it is error, and the order should be vacated.

Judgment reversed, and the order of the county court, allowing the amendment of the declaration, set aside. Continued, for hearing on the report.

SEWALL MORSE AND LUCIUS H. CRANE v. ELROY STODDARD
AND ——— MILLER.

Award.

A bond of submission provided that the award of the arbitrators should be made and published "in writing under their hands and seals." *Held*, that the terms of the submission were complied with, and the submission became irrevocable, when the arbitrators made such award, which was ready to be delivered, and notified the recovering party of its contents.

Held, that an admission in the pleading, and a statement in the bill of exceptions "that the award was made," imported that it was made in conformity with the submission.

DEBT on an award. The bond of submission, in pursuance of which the award was made, required the defendants to observe and perform the award which the arbitrators named should "make and publish of or in the premises, in writing, under their hands and seals, on or before the first day of September, 1853." The defendants plead a revocation on the 30th August, 1853. The plaintiffs replied an award and publication of the same on the 26th August, 1853, which was traversed. Trial by the court, April Term, 1855, —UNDERWOOD, J., presiding.

It appeared, on the trial, that the arbitrators made their award on the 26th of August, 1853, and on the same day notified Mr. Mead,

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the plaintiffs' attorney, of its contents. The cause was heard by the arbitrators, on the 18th and 19th of the same August, at which the defendants were present. A sealed revocation was handed to the arbitrators on the 30th of August, 1853, by the defendants, and before they had been informed of the award.

The court rendered judgment for the plaintiffs, to which the defendants excepted.

Keyes & Howe for the defendants.

Notice of the contents of the award to the plaintiffs' attorney, on the 26th of August, was not a publication, much less a publication "in writing." *Caldwell on Arbitration* 34 and 35. *Kingsley v. Bill et al.*, 9 Mass. 192. *Musselbrook v. Dunkin*, 3 Barn & Adol. 395. *Marartha v. Campbell*, 5 Barn. & Adol. 118. *Monroe v. Allaire*, 2 Caines 320. 2 Saunders 62, a note 4. *Child v. Borden*, 2 Buls. 144. *Aldrich v. Jessiman*, 8 N. H. 516. *Marsh v. Packer*, 20 Vt. 198. *Rixford v. Nye*, 20 Vt. 132. *Knowlton v. Horner*, 30 Maine, 17 Shep. 552. *Kyd on Awards* 29, 30.

D. & G. B. Kellogg for the plaintiffs.

An award made and signed by the arbitrators, is complete and not executory. Although it is usual to notify the parties of its completion, it is not necessary, unless called for by the articles of submission. *Caldwell on Arbitration*, 51-195. 2 Saunders 62. 4 Phil. on Ev. 81. And, if by accident or otherwise, a delivery was prevented, it would still be an award binding upon the parties. *Brown v. Vawser*, 4 East 584. But here the award was not only made and signed, but actually published to one of the parties prior to the attempted revocation. This certainly rendered it valid and binding. *Hunt v. Wilson*, 6 N. H. 36. *Rixford et al. v. Nye et al.*, 20 Vt. 133.

The opinion of the court was delivered by

ISHAM, J. The only question in this case arises, whether the award upon which this action is brought, was made and published before the submission was revoked by the defendants. The award was made on the 26th of August, 1853, and the plaintiffs' attorney was on that day notified of its contents. In the statement that the

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award was made on that day, we are to understand that it was made in conformity to the submission; that it was in writing, and under their hands and seals. The fact that it was so made is admitted in the pleadings, which have been treated as part of the case. It is necessary that the award should have been published also, in order to render the submission irrevocable, and the award binding on the parties. What act amounts to a publication of an award depends upon the stipulation of the parties as contained in their submission. In *Caldwell on Arbit.* 51, 195, the rule is given that if no provision is made, in the submission, that the award shall be published, the arbitrators are not obliged to notify the parties that the award is ready. In declaring upon such an award it is not necessary to aver such notice, or prove it on trial, for the means of knowledge are as much within the power of one party, as of the other. The same rule is sustained in 2 *Saund.* 62, (4) and cases cited. If the submission provides that the award shall be made, and ready to be delivered by a given day, it is sufficient if it be made and ready for delivery, though no notice is given to the parties, for no such provision is contained in the submission. The case of *Brown v. Vawser*, 4 *East.* 584, is a case of that character. The award is made and published when the terms of the submission are complied with. *Hunt v. Wilson*, 6 *N. H.* 37. *Rixford v. Nye*, 20 *Vt.* 133. The bond of submission, in this case, binds the parties to perform the award which the arbitrators "shall make and publish of or in the premises in writing, under their hands and seals," &c. There is no provision that it shall be published to both of the parties. If the award is made in writing, under the hands and seals of the arbitrators, ready to be delivered, and the party in whose favor the award is made, and who is entitled to it, is notified that it is so made, and of the contents of it, it must be regarded as made and published agreeable to the terms of their contract. Having the award made in writing, under seal, and ready for delivery, and notifying the party entitled to it of its contents, is all the publication in writing which the nature of the case admits of. 4 *Phil. Ev.* 81. All these facts, the case finds, did exist in the case, before the revocation was made. The defendants, it is true, had not been informed of the award, when their revocation was handed to the arbitrators, neither does their contract of submission make

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that necessary. It is published when the award is made known, and it is published in writing when the award is in writing, and the contents of that writing made known to the party entitled to it. It is all that is required by the submission.

The judgment of the county court is affirmed.

WRANSLOW HOLTON v. MORGAN WHITNEY.

Husband and wife, occupation of land by, &c.

The possession of a piece of land, belonging to feme covert, upon which she and her husband reside, is a possession of the husband alone; and his acts and declarations are admissible for the purpose of showing the character and extent of the possession; — in this case, to show that a piece of land which was fenced and occupied with that of his wife, did not belong to her, but to an adjoining proprietor.

EJECTMENT to recover the seizin and possession of a small tract of land, about an acre, situate in Putney. Plea, the general issue; trial by jury, September Term, 1855,—UNDERWOOD, J., presiding.

The plaintiff did not rely on any paper title to the premises in question, which, for the purposes of this trial, it was conceded, was in the defendant; but claimed to hold the land by the adverse possession of himself and of Mercy Adams, through whom he derived title to the adjoining land, by virtue of a deed from her administrator. The defendant claimed the land by virtue of a deed from Theophilus and David Crawford, dated April 19, 1849. In the spring of 1828, and for some years before, the said Mercy Adams and her husband Daniel Adams, lived on and occupied the lot conveyed to the plaintiff. In the spring of 1828, a fence was made between the Crawfords and Mercy Adams,—the south end being made by the Crawfords, and the north end by the said Daniel Adams. The fence was made straight,—the south end a board fence, and the north end a pole fence, which run through woods,

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Crawfords' land being west of the line, and Adams' land the east side, and leaving the land in dispute on the east side of said pole fence. Daniel Adams died in March, 1838; Mercy continued to live on the premises till 1847, and died in 1849. Her administrator conveyed to the plaintiff in 1850. It appeared that in November, 1852, the defendant moved a portion of said pole fence east, so as to include the land in dispute with his other land, and was in possession of the same when this suit was commenced.

The plaintiff's testimony tended to show that after said pole fence was built in 1828, the same was repaired by the hired men who worked on the Mercy Adams land, and by the tenants, and that the poles for the repairs of said fence were cut on the disputed land; that they culled out the dead trees on the same for firewood, and that her cattle ran there, as there was no fence between this and Mrs. Adams' adjoining land. The plaintiff's evidence tended to show like possession after Mrs. Adams left the premises, in 1847, to the time of her decease, by hired men and tenants, and, after her decease, by her administrator. The defendant's evidence tended to show that Daniel Adams, while living, managed the farm, hired help, bought and sold the stock, &c., and the defendant proposed to prove by one witness (who testified that he was hired by said Daniel to work on the place, after the pole fence was made,) that the said Daniel Adams told him he must not cut wood on the knoll, (the disputed land,) for he did not own it; that it belonged to the Crawfords. To this the plaintiff objected, and the court excluded the evidence.

The court charged the jury, among other things not excepted to, that Mrs. Adams being a feme covert made no difference in her ability to gain title to the land in controversy by possession; and that if the jury found that the plaintiff, and those under whom he claimed, occupied and carried on the premises by cutting poles, wood, and by depasturing it for a term of fifteen years, uninterruptedly, before the defendant removed the fence, claiming ownership thereof, adverse to all persons, the plaintiff was entitled to recover; and that it made no difference that during part of the fifteen years, Mrs. Adams was a feme covert; that the actual possession during this time could not be qualified by the concessions of her husband,

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so as to prevent the running of the statute of limitations against the grantors of the defendant.

Exceptions by the defendant.

W. C. Bradley and *E. Kirkland* for the defendant.

Mercy Adams could not of herself gain any separate possession of lands, occupied by her husband during coverture, the right of possession being in her husband. 17 Vt. 631, *Shaw v. Partridge*. 9 Vt. 335, *Mattocks v. Stearns et ux*. 26 Vt. 746, *Bruce et ux v. Thompson*. Reeve's Dom. Rel. 27. 2 Kent's Com.

And an adverse possession could not be gained against her during the coverture, she being protected by the statute. Slade's Rev. Stat. 291. Williams' Comp. Stat. 380, § 18. So of a reversioner; *Jackson v. Schoonmaker*, 4 Johns. 390; *Same v. Selick*, 8 Johns. 202.

But, on the other hand, her husband may dispose of her rights of possession, and assign her chattels real if he pleases, were those extending beyond his own life. Reeve's Dom. Rel. 23. If he makes no disposal, they revert to her at his death, but subject to such diminution as she may have made thereof. Reeve's Dom. Rel. 23, 24.

It follows that if they both dwelt on the premises, during coverture, the possession was subject to his control, and whether the possession of the land in dispute was adverse or not, depended on his intention to claim, mere possession alone not being sufficient. Angel on Lim. 476, 477 and note.

And certainly any declaration of the husband's, which went to show his intention, was proper evidence to the jury. *Beecher v. Parmele*, 9 Vt. 352. *Haman v. Pettett*, 5 Barn. & Ald. 223. *Stansbury v. Ackwright*, 5 Carr. & Payne 575. *W. Cambridge v. Lexington*, 2 Pick. 536. *Church v. Burghast*, 8 Pick. 327, 8. *Crowell v. Bebee*, 10 Vt. 33.

And the declaration once made, the possession would be qualified by it, 1 Cowen's notes on Phil. Ev. 597. Angel on Limitations 464 and note.

Keyes & Howe for the plaintiff.

The testimony offered to prove the admissions of the husband, as to the ownership of the land, was rightly excluded.

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The admissions of a tenant or *quasi* tenant, cannot be used to prejudice the rights of the landlord. *Papendict v. Bridgewater*, Law. Rep. Oct. 1855. *Regina v. Bliss*, 7 Adol. & El. 157. *Daniel v. North*, 11 East 372. *Wood v. Veal*, 5 Barn & Ald. 155.

The testimony offered to prove the admissions of Daniel Adams was wholly immaterial, it being offered to prove a fact already admitted in the case, to wit, Crawford's former ownership, and could not vary the result. *Hanchett v. Whitney*, 1 Vt. 316. *Morse v. Crawford*, 17 Vt. 499.

The charge respecting the concession of the husband was not founded on any testimony in the case, and whether right or wrong could not mislead the jury.

The opinion of the court was delivered by

REDFIELD, CH. J. In the present case the plaintiff claimed title to the premises by fifteen years adverse possession. To make out the term, it became necessary to include a portion of the time while the land was claimed to be in the possession of a married woman and her husband, both residing on the adjoining land, the fee of which was in the wife. The judge ruled that he might have the benefit of this possession of the wife, (as he regarded it,) and that "her being a feme covert made no difference in her ability to gain title to the land in question, by possession, and that the actual possession could not be qualified by concessions of the husband, so as to prevent the running of the statute of limitations." And testimony offered, tending to show that after the land in dispute was enclosed, the husband declared that he made no claim of title, but that the land belonged to the Crawfords, was rejected by the court.

The rejection of the testimony, and the charge of the court, seem to us altogether consistent, and equally a misapprehension of the law applicable to the subject. The case presented in the exceptions does not seem to be one where the wife is losing part of her freehold by the adverse possession of an intruder, and the acquiescence of the husband. If so there might have been more color in equity and justice for the rule laid down by the court. But here the plaintiff attempts to make title to land, confessedly not hers, unless obtained by means of an adverse possession, some

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portion of which was while she was under coverture and lived with her husband.

Now, no rule of law is better settled than that such a possession is exclusively that of the husband. A married woman, living with her husband, is not capable of committing a disseisin, as the cases cited in argument abundantly show. Nor can she be said to have either an independent or a joint possession with the husband. The possession is that of the husband alone. She is no more capable of having such possession, than she is of contracting or suing upon a contract made under coverture, or as much, indeed, for she may sometimes be joined with her husband in such case as plaintiff, it is said, when she is the meritorious cause of action, and the promise is made expressly to her. But while she resides with her husband, she could never be said to have any possession of lands or tenements, which were occupied and carried on by the husband. The possession, then, being exclusively that of the husband, his declarations were competent to show its character. And although remote, they were after the fencing of the land into the same field with the other lands occupied by him, and if the jury were satisfied this was originally done by consent of the Crawfords, or in subordination to their title, the possession could avail nothing for the purpose of creating title in Adams, or those who occupied after him, until something was said or done to advertise the owners that those in possession claimed title against them, as has often been held in this state. Judgment reversed and case remanded.

JAMES S. BROWN v. W. J. HITCHCOCK.*Contract. Evidence. Pleading.*

The plaintiff delivered to the defendant a quantity of palmleaf, for which the defendant gave a written receipt and agreement to get it worked into hats or return it when called for, and specified the price at which it was to be accounted for, if used. *Held,*

1st. That the contract was one of bailment merely, and not of sale, the leaf not having been used.

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2d. That parol proof was inadmissible to show that, at the time of the execution of the writing, it was agreed that the palmleaf should remain at the plaintiff's risk; but that testimony was admissible in reference to the condition of the leaf when left, the usage and custom in packing leaf for market, and the necessity and custom of taking it from the sacks and exposing it to the air, and the care exercised by the defendant in that respect.

3d. That the defendant was bound to exercise ordinary care in looking to and preserving it. H

The declaration in this case sustained on motion in arrest, though it would have been defective on demurrer, and there were material variances between it and the proof, on which account, however, no objection was made.

ASSUMPSIT, the declaration being as follows, with the addition of the common counts.

"In a plea of the case, for that the defendant, at said Halifax, on the 5th day of January, A. D. 1850, in consideration that the plaintiff would furnish him, the defendant, palmleaf, to wit, seven hundred and fifty-six pounds, at said Halifax, he, the defendant, undertook and promised the plaintiff to get the said palmleaf worked into hats as soon as he, the defendant, should have worked up what leaf he then had on hand; and the plaintiff avers that he did deliver said palmleaf to the defendant, at said Halifax, and that the defendant long since, to wit, on the 1st day of March, A. D. 1850, worked up what leaf he had on hand at the time of receiving the leaf aforesaid of the plaintiff; that the defendant has not worked said seven hundred and fifty-six pounds of palmleaf into hats, or any part thereof, but wholly neglects and refuses so to do."

"And also, in a further plea of the case, for that the defendant, on said 5th day of January, A. D. 1850, at said Halifax, in consideration that the plaintiff then and there did deliver to him, the defendant, a large quantity of palmleaf, to wit, seven hundred and fifty-six pounds, he, the defendant, then and there received said palmleaf, and undertook and promised to take proper care of said leaf, and get the same worked into hats when he, the defendant, should get what leaf he then had on hand worked up, or return said seven hundred and fifty-six pounds of palmleaf to the plaintiff, when he, the plaintiff, should call for the same. And the plaintiff, in fact, says that the defendant, disregarding his said promise and undertaking, did not take proper care of said palmleaf, but, solely

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through the defendant's want of proper care, said leaf rotted and spoiled and became wholly valueless, to wit, at said Halifax, on the first day of May, A. D. 1850."

Plea, the general issue; trial by jury, September Term, 1855,—
UNDERWOOD, J., presiding.

The plaintiff read in evidence a writing signed by the defendant, executed January 5th, 1850, which was as follows:

"Received of J. S. Brown, one hundred pounds No. 4 leaf,—
"three hundred and thirty-eight pounds No. 3 do.,—three hundred
"and eighteen pounds No. 2 do., which I agree to get worked into
"hats as soon as I work up what leaf I have on hand, or to return
"it to Mr. Brown when called for.

"The above to be accounted for, No. 2 leaf at 10 cents, No. 3
"leaf at 14 cents, and No. 4 leaf at 1 s. per pound, if used."

The testimony on the part of the plaintiff tended to show that the plaintiff delivered to the defendant the leaf specified in the contract at Halifax; that in February, 1851, the plaintiff called on the defendant for a settlement in regard to the leaf,—and that the leaf had then nearly spoiled by heating and moulding, and that the same was occasioned by reason of its not having been taken out of the sacks after it was left, and being exposed to the air.

Here arose a question as to the construction to be given to the contract, the plaintiff claiming it imported a *sale*, and vested the title in the defendant, and that the leaf was at the defendant's risk. The defendant contended that it imported a bailment only, with a right to purchase. The court decided the transaction a bailment, to which the plaintiff excepted.

The defendant gave evidence tending to show that the leaf, when left, was put in the defendant's store-chamber, in the sacks, where the defendant had usually kept his leaf, and piled up in a part of the chamber stated by the plaintiff to be suitable, the plaintiff and defendant being there together; and that the leaf there remained in the same condition, without being disturbed or moved, till the plaintiff called in February, 1851. The defendant's evidence further tended to show that since 1844, he had stored leaf in the same chamber, that he had always so stored it in the original sacks, and that he did not open them except as his customers wanted it; that he never had any injure there, although some had been kept in the

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sack a year and a half; that he kept one sack in the same chamber with the leaf in controversy, from October, 1849, to April, 1852, unopened, without injury; and the defendant testified that he took the same care of the leaf in controversy, as he did of his own, as to airing; and that he never took his own out of the sacks to air. The defendant called several witnesses who had been in the habit of purchasing palmleaf, whose testimony tended to show that they were in a habit of purchasing in sacks, and that it kept without injury in the sacks, and without being opened and exposed to the air; and he also gave evidence tending to show that the leaf, when left, was damp and in an unmerchantable condition, and that the injury arose from its being put up and left in such condition, and not from want of care on his part.

The defendant offered to prove that, at the time the leaf in controversy was left with him, he told the plaintiff, just before executing the receipt, that the palmleaf must remain at the plaintiff's risk, if he left it, and that the plaintiff assented to it; to this testimony the plaintiff objected, and the court excluded it, to which the defendant excepted.

The plaintiff offered evidence to prove the condition in which leaf is usually put up for the trade; and the testimony tended to show that it is put up in sacks in a damp state, that is, so damp as to be in the best condition for braiding; and that in this condition it is usual to sell and buy, and that the leaf in controversy was in this condition when left. The plaintiff also offered testimony to show the necessity and custom of taking leaf from the sack and airing it, if kept any considerable length of time; that the common rule was to sack the leaf when sufficiently damp to be in the best condition for braiding, and that, in that condition, it was the uniform practice for manufacturers to sell, and for purchasers to buy; that leaf thus prepared and sacked ready for market and for braiding, was likely to injure by heating, if suffered to remain in the sack unexposed to the air for any considerable length of time, especially in warm weather; to all which the defendant objected, but the court admitted the testimony, to which the defendant excepted.

The court charged the jury, among other things not excepted to, that the measure of care the defendant was bound to bestow on the leaf while in his possession, until called for, or until the defendant

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H should notify the plaintiff of his election not to purchase, was *ordinary care*; and that if the jury found that the defendant was wanting in ordinary care and prudence in looking to and preserving the leaf from injury by heating, and the injury arose from such want of care, the defendant would be liable, provided, however, they should further find that the leaf, when delivered, was sacked in proper condition to be marketed; that it was incumbent on the plaintiff, in order to recover, to show that he delivered the leaf in a proper marketable condition, as to dryness or dampness, and in order to this, the jury must be satisfied that the leaf, when delivered, was in a condition suitable for the object for which it was designed, and in which it was usual for manufacturers to sell and purchasers to buy, and if the jury found that it was not in that condition when delivered, but that it was put up and delivered too damp, either by design or accident, and this contributed to the heating and injury, the plaintiff could not recover.

To this charge the defendant excepted. The jury returned a verdict for the plaintiff; after which the defendant moved in arrest of judgment, that the declaration was insufficient, &c. This motion was overruled, to which the defendant also excepted.

C. N. Davenport and D. & G. B. Kellogg for the defendant.

Butler & Knowlton and H. E. Stoughton for the plaintiff.

The opinion of the court was delivered by

ISHAM, J. The declaration in this case contains two special counts in assumpsit, and also the general counts. The contract was read in evidence, on the trial of the case, without objection. It appears from the case, that the defendant received from the plaintiff seven hundred and fifty-six pounds of palmleaf, under an agreement to manufacture it into hats as soon as he had worked up the material he then had on hand, or to return it to the plaintiff when called for. If the leaf was manufactured, it was to be accounted for at different prices. The leaf was never used for that purpose, and it appears that it became much injured while in the defendant's hands, by heat and mildew. The plaintiff insisted that the contract was one of sale. The court held that it was one of bailment merely, and to that ruling, exceptions were taken. We

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think the decision of the court was correct on that subject. As the leaf was never worked into hats, the question does not arise in the case to whom the hats would belong if they had been manufactured. It is obvious that, so long as the leaf was unmanufactured, it remained the plaintiff's property, as the identical leaf was to be returned to him on demand. That is the express provision of the contract. While the leaf remained in that state, the duties and obligations arising out of the relation of bailor and bailee existed between them. That relation necessarily results from the fact that a property in the leaf, while in that state, remained in the plaintiff.

The testimony offered by the defendant to prove that an agreement was made, at the time the leaf was left with him, that it was to remain at the plaintiff's risk, was properly rejected by the court. The written contract is certain and specific in its provisions; there is no ambiguity in relation to that matter that requires explanation. It is as incompetent for the defendant to change or alter the legal effect of that contract, as it is to change its language. On that particular bailment, the law imposed specific duties and liabilities. To change those duties, or to create different liabilities, by the introduction of that testimony, would add provisions to it not expressed in the contract. The general principle, that parol contemporaneous evidence cannot be received to contradict or vary the terms of a written agreement, will equally exclude all such evidence to vary its legal effect.

We perceive no objection to the admission of the testimony which was offered for the consideration of the jury by the plaintiff, as well as that offered by the defendant, in relation to the condition of the leaf when left, and the care subsequently exercised over it by the defendant; nor to the testimony in relation to the usage and custom in packing leaf for market, as also the necessity and custom of taking the leaf from the sacks and exposing it to air to prevent its becoming injured and valueless. In relation to all that testimony it may be observed, that it was not offered to control or in any way to affect the contract between the parties. Its object was simply to ascertain the character and degree of care which the defendant should have exercised, and that which he did exert over the property while it was in his possession. The question in issue was,

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whether the defendant had been guilty of negligence in taking care of that property while it was in his charge. On that question, the evidence was proper for the consideration of the jury, that the leaf was placed in a chamber selected by the plaintiff, and which he thought was suitable, and that leaf had been kept there in that manner without injury. It was proper also to show that the leaf was damp and in an unmerchantable condition when it was left, and that the injury arose from that cause, and not from the want of care on the part of the defendant. On the other hand, it was proper for the plaintiff to show that it was usual and customary to put leaf in sacks in a damp state for market, that it was usually bought and sold in that way, and also the necessity and custom of taking the leaf from the sacks and exposing it to the air. The defendant, being a manufacturer of leaf into hats, and having received this leaf for that purpose, is supposed to know what is necessary, and the kind of care required to preserve it. On that subject, contradictory as the testimony may be, it became a question for the jury to determine, under proper instructions from the court, whether the defendant exercised proper prudence and care in taking charge of that property, while it was in his possession.

H The court properly charged the jury that the defendant was bound to exercise ordinary care in preserving the property from injury; not that care which the defendant exercised over his own property, but that care which men of ordinary prudence and judgment exercise over property of their own. Taking the whole contract together, it is obvious that the bailment was one of mutual benefit. The plaintiff was to derive benefit from the disposition and manufacture of the leaf into hats, and the defendant in manufacturing them. It was ordinary care, therefore, that the defendant was bound to exercise over that property. The jury have found, by their verdict, that the defendant did not exercise that degree of care, and that the injury to the leaf was occasioned by it. We see no error in the decision of the court on the trial of the case, and the verdict of the jury is conclusive as to the facts. The exceptions allowed to both parties are overruled, and the judgment of the county court is affirmed.

The declaration, we think, can be sustained on this motion in

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arrest. It is very informal, and would be defective on demurrer, and there are also material variances between the proof and the declaration, but no objections have been taken of that character. Every reasonable presumption should be made after verdict to sustain the declaration; 17 Vt. 464. The motion in arrest is, therefore, overruled.

WILLIAM H. SNOW v. GIDEON N. PARSONS AND JOHN S. PARSONS.

Use of running streams. Question as to its reasonableness.

Evidence.

Uses to which the water of running streams may be applied; and considerations determining the extent or manner of such use.

The reasonableness of the use of a stream of water in a particular manner, or for a particular purpose, and the extent to which a proprietor below must submit or accommodate himself to the inconveniences arising therefrom, when it is, in its nature, doubtful, is a question of fact. And in determining it, testimony showing the uniform custom of the country in reference to it, is admissible.

ACTION ON THE CASE for the obstruction of the plaintiff's water-wheel by the tan-bark discharged at the defendants' tannery on the stream above, and suffered to float down to the plaintiff's mill. The action was referred, and the referee reported the following facts.

The plaintiff was the owner of a saw-mill in West Dover, upon a branch of Deerfield River, together with a privilege of water to operate the same from 1842 to 1845, when he sold them, and from 1849, when he re-purchased, until the commencement of this suit.

In 1844 a tannery was erected upon the same stream, about a mile and three fourths above the plaintiff's saw mill, and was so situated that the tan vats were directly over the stream, and the spent tan was discharged into the stream, and carried by the water down to and by the plaintiff's saw-mill. On the 4th of Octo-

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ber, 1849, the defendants purchased the said tannery, and have ever since continued to own and occupy it, using yearly a large amount of tan-bark, which, after being used, was discharged into the stream and suffered to float down the same. A portion of this tan-bark floated down and lodged in the plaintiff's pond, where it accumulated to considerable extent, and some floated into the flume to the plaintiff's mill, which somewhat incommoded him. Sometimes the tan-bark would accumulate so as to somewhat impede the flow of the water into the flume, but it did not appear that the plaintiff had sustained much inconvenience from that cause, as it was easily removed, and the obstruction did not often occur. The tan-bark accumulated in the plaintiff's pond much more rapidly after the defendants commenced operating the tan works in 1849, and was doubtless owing to the increased quantity of bark used at the tannery; and after October, 1849, portions of it lodged in and upon the plaintiff's saw-mill wheel, whereby the same was impeded and repeatedly stopped, and the plaintiff was thereby subjected to some little delay in operating the mill, and labor in removing the obstruction and getting the wheel in motion. The wheel was of cast iron, and known as the Ferguson reaction wheel, and was so constructed that when tan-bark lodged in it, it was somewhat difficult to remove it, but it might have been altered without impairing its usefulness, and at a small expense, so that the tan-bark would not impede or affect its operations; and prior to 1846 the wheel used was of a different construction, and was not, and would not be obstructed or injuriously affected in any way, by the floating down of the tan-bark.

Upon the hearing before the referee the defendants offered to prove that it had been the universal and uniform custom and practice in all the counties of this state to discharge the spent bark of tanneries into the streams on which they were situated, ever since the country was first settled, and that dam owners situated below on the streams had never, so far as the witnesses knew, disputed the right to do so until now; and that tanneries could not be conducted at any profit without that means of disposing of their spent tan-bark, and that the withholding such use of the streams from tanners, would, in the belief of the witnesses, have excluded that branch of industry from this state; and that the same custom and

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the same practice had uniformly prevailed in all the states and counties of New England, so far as the witnesses had had opportunity of knowing.

To this testimony the plaintiff objected. The defendants admitted that prior to 1844, there was no tannery on this stream. The referee, intending to decide according to law, excluded the testimony offered; and the right of the plaintiff to recover upon the foregoing facts was submitted by the referee to the court; the damages being assessed at forty dollars, if the plaintiff was entitled to recover.

The county court, September Term, 1854,—UNDERWOOD, J., presiding,—rendered judgment, upon the report, for the plaintiff. Exceptions by the defendants.

J. D. Bradley and Butler & Knowlton for the defendants.

Shafter & Davenport for the plaintiff.

The evidence offered, as to the universal and uniform custom and practice of tanneries, was rightly excluded by the referee. So also as to the "acquiescence of mill owners below."

If such custom exists it must be either a *general* or *particular* custom. It is not a general custom, for if it were, it would be a part of the law of the land, of which the courts would take notice, and would not require proof. It is not a good "particular custom," for 1st, it is in derogation of common right. 2d. It lacks the requisites of a good custom. It is not "ancient," for it appears, on the face of the offer, that there was a time, within legal memory, when it did not exist. It has not been "continued." It is not "certain." It is *unreasonable*; it has not been "acquiesced" in; 3d, the "acquiescence" spoken of in the offer, amounts to nothing as to us, for we have not acquiesced; had we done so for 15 years the case would wear a different aspect.

The opinion of the court was delivered, at the circuit session in October, by

REDFIELD, CH. J. The important and, as I think, the only question in this case, is whether it is proper for extensive tanneries, upon moderate sized streams, to expend their refuse, or spent bark, into the stream. In regard to many uses of the water in streams, it has been so long settled by common consent, or is so

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obvious in itself, that it is determinable, as matter of law. Such are the uses for irrigation, for propelling machinery, and for watering cattle, and some others. And in regard to some debris or waste deposits in such streams, there would seem to be no question. The uniform practice, the convenience, and in some instances the indispensable necessity, would seem sufficiently to decide such cases. Among these may be named the infusion of soap dyes, and other materials used in manufacturing, into the streams by which the machinery is propelled. The deposit of saw-dust, to some extent, is nearly indispensable in the running of saw-mills, and most other machinery used in the manufacture of wood, and propelled by water power.

The reasonableness of such use must determine the right, and this must depend upon the extent of detriment to the riparian proprietors below. If it essentially impairs the use below, then it is unreasonable and unlawful, unless it is a thing altogether indispensable to any beneficial use at every point of the stream. An extent of deposit, which might be of no account in some streams, might seriously affect the usefulness of others. So, too, a kind of deposit, which would affect one stream seriously, would be of little importance in another. There is no doubt one must be allowed to use a stream in such a manner as to make it useful to himself, even if it do produce slight inconvenience to those below. This is true of everything which we use in common with others. The air is somewhat corrupted by the most ordinary use; large manufacturing establishments affect it still more seriously; and some, by reason of their vicinity to a numerous population, become so offensive and destructive of comfort, and health even, as to be regarded as common nuisances. Within reasonable limits, those who have a common interest in the use of air and running water, must submit to small inconveniences to afford a disproportionate advantage to others.

It seems to us that this question of the reasonableness of the use of a stream, when it is not settled by custom, and is in its nature doubtful, should always be regarded as one of fact, to be determined by the tribunal trying the facts. In the present case it does not seem to have been treated in that light, unless we regard the judgment of the county court in favor of the plaintiff, as determin-

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ing it. And, as much of the testimony rejected might have had an important bearing upon this question, and no notice is taken of this point either in the report or the judgment, we must suppose it was not the purpose of the county court to decide the case upon that ground. Indeed, the report furnished no adequate materials for such a determination. That portion of the defendant's offer which tended to show that tanneries could not be operated to any useful purpose, without thus disposing of their waste bark, was almost a cardinal point, in determining the main question, and, if shown to the extent offered, might justify the court in finally requiring the proprietors below to submit to *some* inconvenience that those above might not be deprived of all benefit of the stream for this kind of manufacture. And the reasonableness of plaintiffs submitting to this inconvenience must depend upon its extent, and the comparative benefit to the defendants, to be judged of by the triers of the facts.

This must be determined upon general principles applicable to the entire business of tanning, and the importance of discharging its waste materials in this mode, and the probable inconvenience of those below. And if, in this view, they regard the use as an unlawful one, then surely the defendants are liable to all damage sustained by the plaintiff, whether he might have used a wheel less liable to such injury, or not.

But if the use is fairly to be regarded as a lawful one, then, probably, the plaintiffs should have conformed their machinery to the altered circumstances of the stream. And if the defendants use of the stream is a lawful and allowable one, it will make no difference that the plaintiff's mill was first erected, if it had not been in operation a sufficient length of time to acquire any prescriptive right to use the water in an extraordinary manner. And as the plaintiff's present wheel was put into his mill after the defendants' tannery was in operation, and his other wheel would not have been unfavorably affected by bark, nothing, by way of prescription, or license, or prior occupancy, can probably be claimed.

And upon the question of the reasonableness of the defendants' use of the stream, it seems to me the uniform custom of the country for generations, would be of some significance in determining its reasonableness. A uniform general custom upon this subject,

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ought, upon general principles, to have a controlling force. We think, therefore, the case should go back to be determined, upon the question of fact, of the reasonableness of the use by the defendants; 1st, upon general grounds; 2d, the peculiar facts, if any, affecting the reasonableness of the use in this particular case.

In regard to the usage in the country as to tanneries, for generations, without controversy, if shown as offered to be, and if it is all one way, it would have almost the force of law. For all the cases which we have, where reasonable care and diligence can be determined as questions of law, without going to the jury, have grown up out of the practice of particular classes of persons, which, becoming settled and uniform, and known to all, is declared by the court as a rule of law; which, while it was uncertain, was matter of fact to be determined by the jury. A familiar instance of this is the demanding payment, and giving notice of dishonor of bills and notes, which is now fixed to the day the note or bill becomes due, and giving notice by the mail of the next day. Formerly this was submitted to a jury of merchants, who determined the reasonableness of demand and notice upon the particular facts in the case, with reference to the more common usage of merchants.

So, too, in this particular business, if the court were tanners, we might be able to say that bark must, of necessity, be spent in the stream in order to carry on the work at all, or that, in fact, the bark did not essentially injure the proprietors below, or we might know the contrary of both propositions. But not being such, it seems to us as much matter of fact as any other question of reasonable care and diligence.

It is settled law, that every riparian proprietor may use the water for purposes of manufacture, but so use it as not unnecessarily to abridge the use to others; *i. e.*, every such proprietor may use it with care and prudence. What care and prudence is, in such case, must depend upon the facts of each case, the conclusion to be drawn by the triers of the fact. And to assist them in making this conclusion, if they are not themselves experts in the business, they are entitled to have the experience and wisdom of such as are experts, to enable them to judge of the reasonableness of the particular use.

The measure of reasonable care and prudence in such cases, is

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that which prudent and careful men exercise in the management of their own business. And how are we to know this without proof, in those departments of business with which we are not familiar? Proof that all prudent and careful men, in the management of this business, pursued a given course, and that others acquiesced in that course, without objection, would seem to be of the very essence of the inquiry before the jury, in such cases.

Judgment reversed, and case remanded.

BARD P. PAGE v. LEWIS M. OLCOTT, JOHN HENRY DAVIS
AND JAMES BENNETT.

[IN CHANCERY.]

Liability of assignee or other trustee for sales by barter, exchange, or on credit, or on neglect to keep accounts. Grounds of liability to be charged in bill. Parties to suit in chancery. Want of proper parties to be objected to in answer.

An assignee or other trustee who sells trust property by way of barter, or exchange, or on credit, should be charged with the cash value of the property at the time of the sale, and the interest thereon from that time;—unless in the case of a barter or exchange those in interest elect to affirm it.

If he neglects to keep full and fair accounts of such sales, and their amount cannot be ascertained by him, he should be charged with the value of the property and interest.

Upon a bill in chancery against an assignee or other trustee, for a breach of his trust, he should be held to account only for such neglects or breaches of duty as are charged in the bill.

The preferred creditors in an assignment need not be made parties to a bill for an account, brought against the assignee, by a general creditor who claims only the benefit of such a balance as shall remain after paying the preferred creditors.

If the want of proper parties to a bill in chancery is not insisted on in the answer, it cannot, as a general rule, be insisted on at the hearing.

APPEAL from the court of chancery. The bill charged that the defendant Bennett, having been in trade at Rockingham, and being

in failing circumstances, made an assignment to the defendants Olcott and Davis, February 28, 1842, of all his property, consisting of a lot of land with a house, store and barn upon it, a store of goods and other articles of personal property, and all his choses in action, to pay, *firstly*, Francis Bennett, Lewis M. Olcott, Aramitta Wright, Elvira Henry, Thomas Dixon, Elias Olcott, Jonas Proctor, and the debts for which Lewis M. Olcott was holden; *secondly*, the drafts accepted by Leach & Elliott on Bennett's account, and debts due Wentworth, Bingham & Co.; *thirdly*, all other creditors ratably: and averred that the orator was the owner of claims, existing at the time of the assignment, to the amount of \$768.03; that they, Olcott and Davis, accepted the trust and took possession of all of Bennett's estate, goods and chattels, and choses in action, to the amount of \$20,000;—that, in violation of their duties, they sold a large amount of the assets to irresponsible persons on credit, and unreasonably and unjustifiably neglected the collection thereof, to the amount of \$4,000, whereby the same was wasted and lost;—that they had converted into money a great portion of the property and collected large sums of money from the choses in action, more than sufficient to pay all Bennett's debts, including the orators, and the expenses of the assignment: and prayed that an account might be taken of what was due to the orator, and of what the defendants Olcott and Davis had received, or might have received, but for their carelessness and negligence, and of all the funds remaining; and that they be decreed, after paying the preferred creditors, to pay to the orator, and such other creditors as shall come in, &c., a *pro rata* dividend, and for further relief.

The defendant Olcott answered, admitting the assignment and that he and Davis accepted the trust, took possession of the property and made an inventory; and stated that at the time of the assignment he did not know much about Bennett's property or liabilities, but soon afterwards he ascertained that the property would not more than pay the preferred creditors;—that he sold the real estate to Calvin Simonds, for \$1,100;—that on the 27th of August, 1843, there remained in his and Davis' hands personal property and choses in action uncollected to the nominal amount of \$3,505.16, much of which was poor and worthless;—that after the making of the assignment and before August 27, 1843, he had collected of the

choses in action \$3,173.16, and that during said period he had paid to preferred creditors \$3,156.05,—and denied that any part of the funds, to his knowledge or belief, had gone to the use of Bennett; and further stated that, August 27, 1843, ascertaining that Calvin Simonds had purchased in the outstanding preferred claims, and that the assigned property, then in the assignees' hands, was not more than sufficient, and, the defendant believed, not quite sufficient to pay the preferred claims, he, at the request of Simonds and Bennett, delivered the property then remaining on hand to Simonds, to be applied, as far as it would go, to pay the preferred debts, and that he gave his own note to Dixon for his preferred claim of \$1,070, which, at the time of said transfer, Simonds undertook to pay, but did not, and the defendant had been compelled to pay it; that he had spent much time and labor and had been at great expense in executing the trust, for which he had received no remuneration.

Exceptions were taken to the answer: and thereafter an additional answer was filed, stating that it was impossible to state accurately the amount of goods sold, because the store was kept open and the goods sold for cash, barter, or credit, as before the assignment; no account was kept of the cash sales, and the proceeds were put in with the other cash, and used only for the purposes of the assignment; that no memorandum was made of exchanges, and that goods sold on credit were usually charged on blotters, but sometimes notes and receipts were taken; that the blotters could not all be found, and, if found, would not show the true account of the sales of the goods *assigned*, as they included charges for goods received in exchange and upon account; and giving a list of all the amounts due for goods sold August 27, 1843, which were transferred on that day to Simonds, of which \$120 was for goods sold Wm. B. Perry, who was then good, but failed soon after, and the debt became worthless; \$100 for the note of R. S. Bennett, considered good when taken, but which turned out to be worthless; \$374.13 for accounts payable in lumber, mostly in Peru, worth much less than their nominal amount, and stating that many other of the demands in the list became and were of no value; and insisted that he acted in good faith, and with due care and prudence, and with due regard to the interests of all persons concerned; de-

nied that he sold any part of the assets to any person who was irresponsible at the time of the sale or that he had any reason to believe would become so before the expiration of a reasonable credit, or that he unreasonably or unjustifiably neglected to make collections, &c.

The chancellor dismissed the bill and the orator appealed.

Keyes & Bradley for the orator.

W. C. Bradley and *D. & G. B. Kellogg* for the defendants.

The opinion of the court was delivered, at the circuit session in October, by

BENNETT, J. We think the decree of the chancellor, dismissing the bill, should be reversed, and the cause be remanded to the chancellor with instructions to send it to a master, in order that he may make a full and complete statement of the accounts of the trustee Olcott, under the assignment, detailing, with all convenient certainty, his proceedings under the trust, and the report to be made to the chancellor for his action thereon, as to him shall seem meet and proper; the death of Davis, his co-assignee, having now been suggested on the record. This court, however, will indicate to the chancellor certain principles which should be adopted by the master in taking the accounts, leaving other principles to be settled by the chancellor, if found necessary.

So far as the trustee sold the property of James Bennett upon credit, he should be charged with the cash value of the property at the time of the sale, and interest on the same from the time of the sale; and cases no doubt might arise, upon a proper bill, in which the trustee should be made chargeable for a depreciation in the value of the property before the sale, if he has been guilty of culpable negligence in not effecting an earlier sale. In New York, it is fully settled that an express power given to the assignee to sell on credit, renders the assignment void, as against creditors, upon the ground that it may delay them. See *Barney v. Griffin*, 2 Comstock 365; *Nicholson v. Leavitt*, 2 Selden 510; *Burdick v. Post*, 12 Barb. 168, and affirmed in the court of appeals; see 2 Selden 522; and the same principle was again fully recognized by the court of appeals, in *Kellogg v. Slawson*, 1 Kernan 304.

We are well satisfied with the views of the New York courts upon this point, and, for the reasons upon which those cases are based, the cases themselves may be referred to. Though this question has been somewhat discussed of late, in our courts, yet I am not aware that we have had any express adjudication upon it. The case of *Mussey et al. v. Noyes et al.*, 26 Vt. 462, was decided upon a construction of the assignment, the court holding that no *express* power of sale on credit was given in the instrument, and none should be *intended* in order to vitiate the assignment. It cannot be claimed that the present assignment gave a power to sell on credit, and the sale on credit was a violation of the trust. It will not be claimed that the trustee should be allowed to sell on credit, and yet hold the assignment *void* if it provided for such a sale in *express terms*. Trustees, acting in good faith, and with due diligence, should be entitled to an indulgent consideration of the court, yet if they betray their trust, or have been guilty of culpable negligence, they should be dealt with according to the rules of strict, if not rigorous justice. It is necessary, in such cases, that rules of somewhat of a stringent character should be established to prevent speculation in trust funds, and to induce fidelity of conduct.

It would seem to follow that the trustee should not be allowed to deal with the trust property by way of barter or exchange. It is his duty to convert the property of the insolvent into money with all reasonable despatch, and pay over the avails to the creditors, according to the provisions of the assignment. Cases may be supposed, where it might be for the interest of all concerned to allow the trustee to barter away the trust property in exchange for other property; yet this is aside of the trust, and would open a door for speculation and gross fraud, and we think the rule in such cases should be to charge the trustee, at least, with the value of the property, at the time of the exchange, and the interest, unless those in interest shall elect to affirm the exchange. It may, however, be questionable whether there is enough alleged in the bill to allow such a charge.

It might perhaps be claimed that the assignment of the property to Simonds, under the contract set up in Olcott's answer, was a breach of the trust; yet this is not complained of in the bill, and a trustee is not to be held to account for any neglect or breach of

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duty not charged in the bill. It would seem as if the only negligence or breach of duty complained of in the bill was the selling on credit a part of the property, and negligence in not collecting such debts, and in not accounting for such moneys as he had received; but it is not necessary now to settle the construction to be given the bill.

It was the duty of the trustee to keep a full and fair account of the sales of the trust property, and, if he neglects to do this, and the amount of sales cannot be ascertained by him, he should be charged with the value of the property sold by him, and the interest on it.

The objection urged, in the argument, that Leach & Elliott were not made parties to this bill, is without weight.

The bill goes upon the ground that all the preferred creditors are first to be paid, and, of course, their interest is not antagonistic with that of the orator. If the debt of Leach & Elliott has not been paid, the trustee would have a right to detain funds in his hands for that debt, and no questions are raised as to its amount. Besides, the want of parties was not insisted upon in the answer, and the general rule is, if it is not insisted upon in the answer, it cannot be at the hearing.

Decree of chancellor reversed and case remanded, &c.

THE BANK OF BELLOWS FALLS v. THE RUTLAND & BURLINGTON RAILROAD COMPANY, WILLIAM RAYMOND LEE, SAMUEL HENSHAW AND THOMAS THATCHER.

[IN CHANCERY.]

*Enjoining proceedings in a court of law of another state.
Jurisdiction.*

A court of equity in this state may enjoin parties from proceeding in a court of law in another state; but on principles of courtesy, and perhaps of policy, this power should not be exercised where the court of law has a concurrent jurisdiction, which was first assumed and exercised over the subject matter, unless there should exist some peculiar equitable ground for so doing.

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The mere preference of the orators to have the matter determined by their own domestic tribunals, is not a sufficient ground for such an interference: and the inability of the court of chancery to enforce the injunction, is a good reason why it should not be granted when the parties to be enjoined reside out of the state, and have no property within it for a writ of sequestration to operate upon.

Consideration of the above, and other reasons, why, in the present case, such an injunction should not be granted; nor the validity of a deed, upon which the defendants' right of action in the suit at law in another state depends, be tried and determined by a court of equity here.

Demurring to a bill in chancery, for want of equity in it, is submitting to the jurisdiction of the court. The question as to the jurisdiction of the court over the defendants, should be presented by plea.

APPEAL from the court of chancery. The defendants, with the exception of the Rutland and Burlington Railroad Company, were set up as residents of Massachusetts, and service was made upon Henshaw and Thatcher, by leaving a copy with Dugald Stewart, as their appointed and authorized agent, at Rutland in this state; and upon Lee, by leaving a copy with him at Roxbury, Mass. The following abstract of the bill sufficiently sets forth its general nature and object, in addition to what appears, in reference to it, in the opinion of the court.

November 16, 1853, the Rutland and Burlington Railroad Company, owed the plaintiffs \$25,000; William Raymond Lee, then president of said company, and professing to act for them, but without authority, on that day made a deed of surrender to Samuel Henshaw, and J. Thomas Stevenson, of all the property and franchises of the company, in trust for the uses and purposes specified in a mortgage executed by said company to them, dated August 1st, 1850. The deeds of mortgage and surrender are referred to. By the terms of the mortgage, the company were to have the exclusive use, &c., of the road, &c., until conditions broken; and, at the time of the surrender, the conditions of the mortgage had been fully performed, and in no ways broken. Lee had no lawful authority to make the surrender, but did so without the knowledge or consent of the company, and with the fraudulent intent of defrauding the plaintiffs, and preventing them from securing their debts; and Stevenson and Henshaw knew of the fraudulent intent, and participated therein by accepting the surrender, and agreeing to execute the trust. January 31st, 1854, the plaintiffs sued

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the company on their said debts, and attached five engines with the tools used about them, and four passenger cars, and obtained judgments at the September Term of the Windham county court, 1854, for about \$25,000, including damages and costs,—took out their executions, and had the attached property sold thereon in due time and form, and the proceeds of the sales were insufficient to satisfy the judgments. January 1, 1854, Stevenson resigned, and Lee took his place as trustee, and thereafter Henshaw and Lee claimed to hold the attached property, under and by virtue of the surrender, and February 15, 1854, sued the plaintiffs in trespass for said property, which action is now pending before the supreme court in Boston, Mass., and which they threaten to prosecute to judgment and execution. April 1, 1854, Lee resigned, and Thomas Thatcher, then president of the company, took Lee's place as trustee. The plaintiffs further charge that the deed of surrender was not made in good faith, but for the purpose of defrauding the plaintiffs and other creditors, by placing the property of the company beyond the reach of their creditors; and pray that the deed of surrender and conveyance of Nov. 16, 1853, may be vacated, set aside, and decreed to be null and void; and that Lee, Henshaw and Thatcher, may be enjoined from prosecuting the trespass suit in Massachusetts, and also from proceeding at law against the plaintiffs touching any of the matters in question, and for further relief &c.

All the defendants appeared and demurred, because the bill "contains not any matter whereon this court can ground any decree, or give the complainants any relief or assistance."

The chancellor dismissed the bill at the September Term, 1855, from which the orators appealed.

L. B. Peck and D. & G. B. Kellogg for the orators.

All the defendants have submitted to the jurisdiction by appearing and pleading. But the question of jurisdiction is not raised. The demurrer is to the merits of the bill. Had any of the defendants desired to raise this question, it should have been presented by plea. *Thobudeau v. Rous*, Atkins 544.

The case then is to be considered and decided on the merits,—on the facts stated in the bill. These facts being fully stated, they

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must be taken as true for the purposes of this trial, as they stand admitted by the demurrer.

If the deed and act, under which the defendants claim, gives them no title to the property, either on the ground that they were unauthorized, or were a fraud on the orators, the jurisdiction of chancery to interfere is clear and undoubted. That the orators may avail themselves of this defense at law, is no answer to the bill. It is inequitable, and against conscience to permit a party to use a deed, or take advantage of an act thus improperly obtained. 6th Am. Ed. Mitford's Chan. Pleadings 149, 150-1-2. Coopers Pleadings 140. *Hamilton v. Cummings*, 1 John. Ch. 517. *Briggs v. French*, 1 Sumn. 504. *Peirsoll v. Elliott*, 6 Peters 95. *Newman v. Milner*, 2 Vesey, Jr. 483. *Jervis v. White*, 7 Vesey, Jr. 413. *Bromley v. Holland*, 5 Vesey, Jr. 610. *Underhill v. Horwood*, 10 Vesey, Jr. 209. *Hayward v. Dimsdale*, 17 Vesey 112.

The transfer of the property to the trustees is charged to have been fraudulent, and made and received for the purpose of avoiding the orators' debt. This gives the court jurisdiction. Fraud is always a ground of relief in equity, though there may be a remedy at law. Adams' Eq. 610, and note. Cooper's Eq. Plead. 139.

The defendants, holding by virtue of a fraudulent conveyance, hold as trustees for the orators, who are creditors, and chancery ought not to permit the trustees to harrass the *cestui que trusts*, by a suit at law.

Parties are often enjoined from proceeding in the courts of another jurisdiction. Judge Story in his treatise on Equity Jurisprudence, lays down the rule as undoubted, that such decrees may be made. 2 Story's Eq. Jurisp. § 899, 900-1 and note, p. 230. *Bushby v. Munday*, 5 Madd. 307. *Cruikshanks v. Roberts*, 6 Madd. 104. *Beckford v. Kemble*, 1 Sim. & Stu. 7. *Portastington v. Soulby*, 8 McKeen 104.

To authorize such a decree, it is not even necessary that the defendant should reside within the jurisdiction of the court. If the subpoena is served on him within that jurisdiction, that is sufficient, though he may only be passing through the state. *Mitchell v. Bunch*, 2 Paige 606, and cases cited by chancellor.

If the court should decline to enjoin the defendants from pro-

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ceeding at law, they may prohibit them from setting up any claim under the deed, or declare it inoperative, as against the orators.

There are special and peculiar reasons calling for the interposition of a court of equity, in this state, in the present case. Both the orators and the defendants, Lee and Thatcher, claim under the Rutland & Burlington Railroad Company. This company is located here, and charged as a party to the fraud. The subject-matter of the controversy arose and remains here. The property was located here and subject to our laws, and the jurisdiction of our courts.

Under the circumstances, the defendants ought not to be permitted to draw this matter of controversy into another jurisdiction, and force the orators to go there and litigate the matter. If the defendants claim rights under our laws, they should permit those laws to be construed, and those rights to be determined by our courts.

D. A. Smalley for the defendants.

This court has no power to enjoin legal proceedings, regularly commenced by citizens of another state in the courts of that state. Such jurisdiction would be against comity and sound policy. It would result in retaliation by the foreign court, which would have the same power to restrain the proceedings of this court. Nor could such an injunction be enforced. This principle is well settled. *Mead v. Merrith & Peck*, 2 Paige 402. *Bicknell v. Field*, 8 Paige 440. *Burgess v. Smith*, 2 Barb. Ch. 277. 2 Story's Eq. Juris. § 899, 900, 743, 744. Story's Eq. Pleadings § 489, 490.

Even the federal courts will never restrain proceedings in a state court, nor permit the state courts to restrain proceedings in the federal courts. *Diggs & Keith v. Wolcott*, 2 U. S. Cond. R. 75. *McKein v. Vashers*, 7 Cranch 492.

Especially does this objection apply to the present case, where the court has not got jurisdiction of the parties. The defendants are not within the jurisdiction, and are only constructively before the court.

See original bill and return of service, from which it appears that the bill was served by a Vermont officer, on the defendants in Boston.

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The objection may well be taken by demurrer. *Bicknell v Field*, above cited. Story's Eq. Plead. § 493.

The appearance of the defendants was only to object to the jurisdiction, which they did at the earliest possible moment.

The court will not entertain a bill to set aside the deed of surrender, at the instance of those not parties or privies to it. If void as to the orators, it will be so treated at law and in equity, and can do them no harm. But so long as acquiesced in by the parties to it, it is good against them, and will not be cancelled or set aside at the instance of those not affected by it. Nor would such a decree be of any benefit to the orators, unless accompanied by an injunction against the further prosecution of the suit in Massachusetts.

Aside from these objections, the bill presents no case for the interference of this court.

A defendant can only enjoin a suit at law, and transfer the litigation to a court of equity, when the defense set up is of an equitable character, and peculiarly cognizable in chancery. *Mitchell v. Oakley*, 7 Paige 68. *Barrett v. Sargeant*, 18 Vt. 365. *Washburn v. Titus*, 9 Vt. 211. *Viele v. Hoag*, 24 Vt. 46. *Russell v. Clark's Exrs.*, 2 U. S. Cond. 417. Story's Eq. Plead. 473, 481-2.

The opinion of the court was delivered, at the circuit session in October, by

BENNETT, J. The facts charged in the bill are quite briefly recapitulated in the abstract furnished to the court, which may be referred to, as well as the prayer of the bill. The case shows that all the defendants appeared and demurred to the bill, upon the ground that it contains no matter whereon a court of chancery can ground a decree, or give the complainants any relief or assistance. The bill seeks to have the deed of surrender declared void, and that Lee, Henshaw and Thatcher may be perpetually enjoined from the prosecution of the action of trespass now pending, against the orators in this bill, in the supreme court of Massachusetts.

Before proceeding to an examination of this case, it should be remarked that Lee, Henshaw and Thatcher are all set up in the bill as residents of Massachusetts, and that the facts alleged in it, are all examinable at law, and a court of law is as competent to decide upon them, as a court of equity. No fact is alleged which

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disenables the orators from having their case, in the court of Massachusetts, fairly and fully tried at law; and nothing is alleged to prevent that court from exercising their full judgment, and granting full and adequate relief, if the allegations in the bill are true. No defect of testimony is alleged, no discovery is sought, and no appeal is made to the conscience of the defendants. The facts which are alleged, have precisely the same operation in a court of law as they would have in a court of equity; and it is not even insinuated in the bill that a resort to chancery is necessary to prove them. The plaintiffs' *claim*, in the action at law, is for *damages*, alleged to have been sustained by reason of a wrongful taking of property of which they had the legal title; and it becomes an interesting inquiry whether a court of chancery in this state, under the circumstances in this case, should, in effect, withdraw from the court of Massachusetts the power to proceed in the case, either by declaring the deed of surrender *void*, or by injunction on the parties, and thus, in effect, *oust* the court of Massachusetts of a jurisdiction which had rightfully attached, and that, too, in behalf of her own citizens, and *before* any proceedings were instituted in the court of equity in this state. In the case of *Mead v. Merritt*, 2 Paige 404, it is held by the chancellor that an injunction bill will not be sustained to restrain proceedings in a suit previously commenced in a court of a sister state, by acting on the parties within its jurisdiction; and he says that not only *comity*, but *public policy* forbids the exercise of such a power. See also *Bicknell v. Field*, 8 Paige 440; and in *Burgess v. Smith*, 2 Barbour's Ch. Rep. 280; the chancellor says, it must be a very special case, (if the court has the power,) which will induce it to break over the rule of comity and policy, which forbids the restraining of the proceedings in a suit already commenced in a sister state, in a court of competent jurisdiction. See also *Costa v. Griswold*, 4 Edwards' Chancery Reps. 364. But we are not disposed to put the case upon any such narrow ground, and we apprehend that, in a proper case, it is entirely competent for a court of chancery to restrain a party within the jurisdiction of this state, from pursuing an action commenced in a court of law in a sister state. Although it was held, at an early day, in the case of *Love v. Baker*, 1 Chancery Cases 67, by LORD CLARENDON, that an injunction would not lie to stay a suit at Leghorn, yet in

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subsequent times this case has not been followed, and it has been regarded as at variance with first principles. In the case of *Bushby v. Munday*, 5 Mad. 297, the defendant was restrained from proceeding in a suit previously commenced in the court of sessions in Scotland; and though Scotland was a part of the British possessions, yet her courts were distinct and independent; and it was there said that the principle would be the same, when the suit, which it was sought to enjoin, was pending in any foreign jurisdiction. See Eden on Injunctions, 3 Amer. edition, vol. 1, p. 176, and 2 vol. Story's Equi. Jurisprudence, sections 899 and 900, and notes, and the cases there cited, which seem fully to establish the position that, though courts of equity do not control the courts of another country, yet they may control persons and things within their own territorial limits; and that it may act *in personam* upon such parties, and enforce obedience to their decrees by process *in personam*. We apprehend that the courts of sister states, in relation to this principle, stand upon the same ground as courts strictly foreign. Judge Story treats the cases, which show that state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former, as exceptions to the general doctrine, and as proceeding upon peculiar grounds of municipal and constitutional law. Admitting then, the power of the court of chancery to enjoin a party from proceeding in the prosecution of a suit at law, previously commenced in the courts of a sister state, in a proper case, the inquiry arises, is this such a case? It is a familiar rule, in a court of chancery, not to entertain jurisdiction where there is a plain and adequate remedy at law; but the argument in this case, in behalf of the orators, is that the bill charges *gross fraud*, which stands admitted by the demurrer; and that courts of equity have concurrent jurisdiction with courts of law in all matters of fraud. Suppose we admit the proposition to be true, to its full extent, will it aid the orators' case? We think not. We hold it to be a sound rule of law, based upon the most salutary principle, that in all cases of concurrent jurisdiction, the court that has first possession of the matter should be left to decide it, unless there exists some peculiar equitable ground for withdrawing a controversy from a court of law to a court of chancery, and which disenables the party, having the law in his favor, from bringing his case fairly and fully before

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a court of law. This principle is founded upon the courtesy which courts of concurrent jurisdiction should exercise towards each other, and may be necessary, as matter of policy, to prevent a conflict in the action of different courts. In the case of *Stearns v. Stearns*, 16 Massachusetts 171, a decree of the court of probate, appointing commissioners to make partition among the heirs, was reversed upon the ground that, *before* any proceedings were had in the probate court, a petition for partition was pending in the courts of common law which had concurrent jurisdiction with the court of probate to make partition among the heirs. The case goes upon the ground that the court, where the first jurisdiction had attached, had the paramount authority. So in *Mallett v. Dexter, administrator of Fenner*, 1 Curtis C. C. Rep. 178, the court refused to draw the administrator into a court of chancery for an account and settlement of his administration, it appearing that *before* any proceedings had been had in chancery, the defendant was in the process of settling his administration before a court of probate of Rhode Island.

This was a case where a court of equity had original chancery jurisdiction, *concurrent* with the court of probate. In a recent case in equity in the circuit court of the United States for Maryland, where the state court, as a court of equity, had taken jurisdiction of the subject matter, it was held that the rule of comity required that paramount authority should be yielded to the court, before which the proceedings were first instituted, and where the jurisdiction first attached, although the courts had concurrent jurisdiction, one being a federal, and the other a state tribunal. See vol. 4, American Law Register, page 526, July No., 1856. In *Smith v. McIver*, 9 Wheaton 532, the principle is laid down, as applicable to a case pending at law and in equity, that where there is a concurrent jurisdiction in the two courts, upon the ground of fraud, that the court, (and in that case it was the court of law,) which first takes jurisdiction, must determine the case conclusively. See to the same effect, *Thompson v. Hill*, 3 Yerger 167; and *Flournoy's, executors v. Halcomb*, 2 Munf. 34; *Winn v. Albert*, 2 Maryland Ch. Decis. 42; *Gould v. Hayes*, 19 Alabama 438; *Waples v. Waples*, 1 Harrington, 392. In the case of *Pugh v. Brown et al.*, 19 Ohio Rep. 202, 211, it was also held that if a

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court of chancery has obtained rightful jurisdiction over a subject matter, another court of chancery, of equal authority, will not assert jurisdiction over the same matter. The case of *Shelby v. Bacon, et al.* 10 Howard 56, is not opposed to the decision made in this case. In that case, the complainant had the right to come in to the United States court to establish his claim as a creditor, and to compel the trustee to pay to him his distribution share of the assets of the assignor; and the state court had not obtained jurisdiction over either of these subjects; and it is by no means decided, in that case, that if the plea had shown that the state court was in the exercise of a jurisdiction over the subject matter of the accounts of the trustees, with an authority to act *in rem*, the complainant could have compelled the trustees to come into another jurisdiction to settle their accounts.

Going, then, upon the ground that a court of equity has the power to stay a party from proceeding at law in a foreign court, or in a court of a sister state, and would exercise the power in a case where the ends of justice require it, notwithstanding the courtesy which should be maintained between courts of different jurisdictions; yet this is not, we think, such a case. It is to be presumed that the ends of justice will be fully subserved, when we leave this controversy to be settled in the courts of Massachusetts, in which the jurisdiction first attached. We know it is not unfrequently the case, that a party may prefer to have a controversy settled by its own domestic tribunals; and it is quite possible that the orators may have been actuated by some such motive in bringing this bill; but this is not a reason upon which this court can act.

We think there is another reason why this court should not enjoin the party from proceeding in their action in Massachusetts. It would be worse than idle for the court of chancery, in this state, to decree an injunction when they have not the means of enforcing its decree. It is well understood that by the *primary* jurisdiction of courts of equity, they acted merely *in personam*, and an obedience to its decrees was compelled by attachment against the bodies of the parties; and the mode, now sometimes adopted, of compelling an obedience to its decrees, by a sequestration of the property of the party, is, comparatively speaking, of modern origin. But in the

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present case, there is no pretence that these defendants have property, subject to sequestration, within this state. They hold the railroad property as trustees, and the rights of the *cestui que trusts*, could not be affected by a sequestration of the property.

I see no way to make a decree enjoining the party effectual, in the case before us. The persons, against whom the injunction is sought, are residents of Massachusetts, and were not personally within the jurisdiction of the court of chancery at the time the process of that court was served upon them. If they had been, a performance of a decree of injunction might have been secured by means of *equitable bail*, as it is termed, obtained by means of a *ne exeat*, in a case proper for such a writ to issue. Whether this would have been a proper case for a *ne exeat*, it is not necessary to inquire.

The case of *Mitchell v. Bunch*, to which the court have been referred, 2 Paige 606, came up upon an application to discharge a *ne exeat* which had been granted against a resident of Carthage, who was *temporarily* within the state of New York; and it was discharged by the chancellor upon the ground that the defendant in the bill had been held to bail on the same debt, in an action commenced in the circuit court of the United States, that is unless the complainant should elect to discharge him from the arrest in the circuit court, upon his appearance, or filing common bail. This is the very point in the case, and it seems to have but little bearing upon the question now before us, in showing that an injunction could be made effective.

We have no difficulty in regard to the jurisdiction of the court over these parties. All the defendants have, in fact, submitted to the jurisdiction by appearing and pleading to the merits of the bill, the demurrer being simply for want of equity in the bill; and if the defendants wished to raise the question of jurisdiction over them, it should have been presented by plea; *Roberdeau v. Rous*, 1 Atkins Rep. 544. It is said that the act of 1854, makes the defendants citizens of this state, and subjects them to the jurisdiction of our courts. See statute of 1854, p. 32, relating to the service of process on non-resident trustees of railroad corporations. The most that can be claimed is, that this act brings certain persons within the reach of process, and provides for a mode of service

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upon them, but it furnishes no reason why a court should make a decree, which it is not in their power to make effective.

It is claimed by the orators that, if this court should decline to enjoin the defendants from proceeding at law, they may and should prohibit them from setting up any claim under the deed; or declare it void, as against the orators; and it becomes an important inquiry, whether chancery should grant the relief prayed for in either of these forms. The same difficulty exists in making a decree effective, enjoining the party from setting up any claim under the deed, in the court of Massachusetts, as would exist in case the decree should pass in the form of an injunction against the party, from further proceeding in the action at law. A decree, in either form, would simply act *in personam*, and could be enforced only by process *in personam*, but it may be claimed and admitted that a decree declaring the deed void, would act upon the transaction. The bill alleges this deed of surrender void on two grounds, first, because the deed was executed by the president of the railroad company, without any authority, and secondly because it was executed in fraud of the rights of the orators, as creditors of the railroad company. It may be remarked that this controversy only relates to personal property, and, upon the allegations in the bill, the complainants have a most plenary defense in the action at law, as has been before stated. There are many cases in the books, in which courts of equity have given relief, by decreeing the delivery up or the cancellation or rescission of agreements, deeds and other instruments, but in such cases, the jurisdiction of chancery is put upon some peculiar ground, and rests in the sound discretion of the chancellor, and is not a matter of absolute right. The discretion of the chancellor, however, is not to be an arbitrary or a capricious discretion, but a reasonable one, which will commend itself to the conscience of the chancellor, under all the circumstances of the particular case. The jurisdiction, in such a case, proceeds upon the ground of administering protective, or preventive justice, and the cases go upon the principle *quia timet*, as it is technically called; and the inquiry now is, are there any particular circumstances attending this case, that should induce a court of chancery to grant the peculiar remedy, which, in this re-

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spect, is sought by this bill. In cases of fraudulent conveyance of real estate, it has been held that the remedy at law is not adequate and complete for all purposes, inasmuch as the deed may throw a cloud over the title, and for this reason chancery has taken jurisdiction to set it aside. So instruments are often decreed void, and to be cancelled, although the objections to their validity may be urged at law, and this for fear that, by the lapse of time, the evidence to impeach them may be lost, and also in cases where the party may be exposed to vexatious suits, as often as it may suit the purpose of the holder to gratify a spirit of litigation and vexation.

The opinion of CHANCELLOR KENT, in the case of *Hamilton v. Cummings*, 1 John. Ch. 577, to which we have been referred by counsel, is a strong case for the exercise of the jurisdiction, and contains a review of most of the leading cases on the subject, up to that time; yet he puts the jurisdiction, or perhaps more properly the exercise of the power, in the sound discretion of the court, and to be regulated by the circumstances of each particular case. It is quite evident the chancellor, in that case, intended the exercise of the jurisdiction to be somewhat modified, for he uses this emphatic language: "but while I assert" (he says) "the authority of the court to sustain such bills, I am not to be understood as encouraging applications where the fitness of the exercise of the power of the court is not pretty strongly displayed. Perhaps" (he adds) "the cases may all be reconciled on the general principle that the exercise of this power is to be regulated by sound discretion, as the circumstances of the individual case may dictate, and that the resort to equity, to be sustained, must be expedient, either because the instrument is liable to abuse from its negotiable character, or because the defense, not arising upon its face, may be difficult or uncertain at law, or from some other special circumstances, peculiar to the case, and rendering a resort to chancery proper, and clear of all suspicion of any design to promote expense and litigation," and I might add, also, to change the forum of the trial without any good reason.

The bond, in the case in *Johnson*, had been taken under a secret trust, and there had been a failure of that trust, and the chancellor

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viewed it, at least, as doubtful, whether at law a failure of the trust could be used as a defense. In such a case, the power of the chancellor to cancel the bond is clear.

Peirsoll et al. v. Elliott et al., 6 Peters, was a bill for a perpetual injunction, and to compel a delivery up of a deed of conveyance of land, which was void upon its face, and the court declined to give the relief prayed, upon the ground that it was void upon its face, and consequently the defense must have been plain, adequate and complete at law. Though it does not appear that the deed of surrender in the present case was void upon its face, yet the infirmities in the deed, as claimed to exist in the bill, are equally examinable and available at law, as in chancery; and we apprehend there are no peculiar reasons, which exist in the present case, why the court should exercise the powers which they are asked to do by the bill. The suit at law to try the validity of this deed, was pending when this suit was commenced, and most probably will be brought to a final determination in a shorter time than would be required, in a court of chancery, to bring the controversy to an end; and hence a fear that the testimony necessary to show the infirmities in the deed may be lost by lapse of time, cannot be urged as a good ground for going into chancery. In a case where a bill, *quia timet*, was filed to compel the delivery up of an apprentice's indentures, after he was out of his time, a decree was made upon the master, in the alternative, that he should either bring his action at law in one year, or deliver up the indentures. *Bracken v. Bentley*, 1 Chan. Rep. 110.

Though it may be a wholesome jurisdiction for chancery to exercise, to order *void instruments* to be delivered up, in cases where *vexatious* demands might afterwards be made upon them; yet in the present case there is no more vexation in having the rights of the parties tried at law, than there would be in chancery, and there may be much less. An adjudication in either court, upon the validity of the deed of surrender, would be final and conclusive upon the parties; and I am not now aware of a case where a creditor levying an execution upon *personal* property has been allowed to go into chancery to set aside a conveyance of such property, for fraud, upon the sole ground that it cast a cloud upon the title to the property, especially while a suit was pending by the claimants

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at law, to recover the value of the property. The claimants of this property reside in Massachusetts, and if it has been wrongfully taken from them in this state, their right of action is transitory, and the suit may well be brought in that state, provided the court have acquired jurisdiction over the bank. We do not see that the *situs* of the railroad company, under whom each one of the parties claim, or of the subject matter of the controversy, or a consideration of the question by what laws the rights of the parties are to be determined, can be made the ground of any equitable right peculiar to the complainants, or furnish a sufficient reason why this court should override and control indirectly the jurisdiction of the court of Massachusetts.

It is no doubt true that there is considerable contrariety of opinion in the cases in England, and in this country, relative to the questions which arise in this case, and it would occupy too much time and space to analyze and compare them one with another.

In the case of *Mitchell v. Oakley*, 7 Paige 68, it was held, in a case where the complainant had a perfect defense at law in a suit pending against him, taking the allegations in his bill to be true, that, although a court of chancery had concurrent jurisdiction with a court of law in relation to the subject matter of the suit, yet it would not grant a preliminary injunction for the mere purpose of obtaining *exclusive* jurisdiction of the suit, but that the party might, in such a case, come into chancery for relief upon the *final hearing* of his cause, subject to the power of the court to refuse him his costs, and that to entitle him to a *preliminary* injunction to stay proceedings in a common law court, first commenced, he must show, *by his bill*, that some injustice would be done him, or that he would be deprived of some legal or equitable right if the proceedings at law were permitted to proceed. To the same effect is *Gridley v. Garaison*, 4 Paige 647. It may be remarked that there are no allegations in the orator's bill to show a necessity of going into chancery for the furtherance of justice, and the cases in Paige would require this court even to refuse a *preliminary injunction*, staying the proceedings in Massachusetts. But so far as those cases go to show that the complainant may come into chancery for relief upon a *final hearing*, subject to be disallowed his costs, it appears to us they are not founded upon any sound or *salutary*

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principle. They leave to the adversary the right to proceed in a litigation of the facts in a common law trial, at the same time the proceedings are going on in chancery, and, upon a *final* hearing in chancery, the common law court may be ousted of their jurisdiction to proceed in the cause. The doctrine of those cases leads to a needless accumulation of costs to the parties, and a conflict is induced between the parties, and between the courts, in determining in which court a *final* hearing shall be first had. It appears to us much more accordant to sound principle and policy, in such cases of concurrent jurisdiction, where there is no occasion of going into chancery, to hold that that court which has first assumed jurisdiction and control over the subject matter of the controversy, should be entitled to retain it for a final hearing, and such we believe to be the current of authority.

We think the decree of the dismissal of this bill, by the chancellor, should be affirmed with costs. Let the cause be remanded accordingly.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF WINDSOR.

AT THE

MARCH TERM;

AND AT THE

CIRCUIT SESSION, IN OCTOBER, 1856.

PRESENT,

HON. ISAAC F. REDFIELD, CHIEF JUDGE.

HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.

HON. MILO L. BENNETT, }

WALTER L. JOHNSON v. WILLIAM KINGSBURY AND EUSEBIA
KINGSBURY

*Discontinuance of suit by expiration of justice's term of office;
liability of the plaintiff for the defendant's costs.*

An action pending, and on trial by a jury, on the 30th day of November, before a justice of the peace whose term of office expired on that day, was proceeded with, by the agreement of the parties, until 6 o'clock on the morning of the 1st of De-

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ember, when the jury failed to agree; and the ex-justice took no further cognizance of the cause, and neither party caused a new justice to be substituted in his place. *Held* that the defendant therein could not maintain an action against the plaintiff for the taxable costs to which he had been subjected in his defense of the suit.

ACTION ON THE CASE. The declaration set forth the commencement, on or about the 6th of September, 1853, of a suit by the defendants against the plaintiff, returnable before Prescott Heald, Esq., a justice of the peace, on the 12th of said September; a trial by jury before said justice on the 12th, and subsequently by adjournment on the 26th of September; upon both which trials the jurors failed to agree and were discharged; a further continuance of said suit to the 28th of November, and the declaration then proceeded as follows.

"And on said 28th day of November, aforesaid, a jury was again empanelled, and the trial of said cause occupied the 28th, 29th and 30th days of said November, and up to six o'clock in the morning of the first day of December, 1853; and the plaintiff avers that the term of office of said justice Heald expired on the last day of November aforesaid, and the said justice Heald was not elected a justice of the peace for the year, commencing on said first day of December. And on said 30th day of November, late in the day, it was agreed by and between the counsel for the plaintiffs and defendant, in said cause, that if said trial could not be ended before the first day of said December, that said justice Heald might continue to act as justice in said cause, until the jury should return a verdict in said cause, and judgment be rendered on it, or until said jury should fail to agree; and that all the acts of the said Heald, as aforesaid, should, after the expiration of his said office, be binding upon the parties, as though his office continued to that period; and said justice Heald proceeded with the trial of said cause, and said trial continued until past twelve o'clock at night of said 30th day of November, and until six o'clock in the morning of the first day of said December, when the jury in said cause failed to agree, and said justice Heald took no further cognizance of said cause, and no other justice was requested to, or did take cognizance of said cause, but the same was ended as aforesaid, and was in no way thereafter revived; and the plaintiff avers that the legal and

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taxable costs he was put to in defending said suit, amounted to the sum of fifty dollars."

To this declaration the defendants demurred. The county court, December Term, 1854,—UNDERWOOD, J., presiding,—adjudged the declaration sufficient, and that the plaintiff recover, as damages, the costs set forth in his declaration. Exceptions by the defendants.

L. Adams for the defendants.

H. E. Stoughton for the plaintiffs.

The opinion of the court was delivered by

REDFIELD, CH. J. This case comes before the court upon demurrer to the declaration. The case, attempted to be made, is certainly one of new impression. It is attempted to be maintained upon the authority of those cases where a party sues out process, returnable before a justice, and then omits to enter his action, by which the defendant is deprived of costs, after having incurred expense in preparing for trial. But it seems to us the present case differs essentially from that class of cases. Here there not only is no positive wrong alleged against the defendants, but it seems to us difficult to imply any. If the suit had been set so near the end of the official term of the justice, as to involve the probability that he would not be able to finish the proceeding, it might be said he should be held liable for a result which he might reasonably have anticipated. But here it would seem probable the writ was sued out before the question of the re-election of the justice was determined, being alleged to have been on or about the sixth day of September; and it was made returnable upon the twelfth day of September, leaving nearly three months in which to finish the case; a term amply sufficient, in all reasonable probability.

The course of the litigation is nothing for which the defendants were responsible. That was controlled by an agency superior to them, and over which they were not expected to exercise dominion, and for whose errors or imperfections they were not, in any sense, responsible. The case being tried upon the 12th of September, the 26th of the same month, and the 28th, 29th and 30th of November, by jury, who were unable to agree, and being finally, by

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agreement of parties, continued on trial six hours beyond the official existence of the justice, it was abandoned by both parties, it would seem.

How there is anything in all this, of which the plaintiff can justly complain, it is certainly difficult to conjecture. It is not alleged that he had any just defense to the claim in the former suit. From the course of the litigation we may fairly presume, perhaps, that he intended to defeat the recovery, and that he acted in good faith. But if the thing is to be determined by mere intentment, it seems to us an equal chance that he might or might not have failed in his defense, if the suit had been pushed through. It seems, at all events, a reasonably fair presumption, that it was a mercy to the plaintiff, and equally to the defendants, that the litigation ceased as it did, and when it did.

The plaintiff here certainly could not complain that the justice should continue to take cognizance of the cause, up to the utmost limit of his official existence. The act of 1851 does not authorize any other justice to assume the jurisdiction in anticipation of his speedy demise, because he probably may not be able to finish the trial, but only to take cognizance, "upon proof of the expiration of said term of office." And the second justice is to make a record of such expiration as the basis of his own jurisdiction. He could not interfere then until that event transpired. And it is very obvious that the statute has no natural fitness of application to any such case as the present, or to any case, except one where the writ is issued in one official year, returnable in another, where the justice is not re-appointed. The words of the statute are, "whose term of office shall expire before the trial of said action." This action had been sufficiently tried before the justice's term of office expired, but it was still pending and in this respect the statute may be said to apply. But if the statute applies to this case, it must equally to one where the trial is before the court; and it would certainly present a very awkward and somewhat farcical proceeding, to have another justice enter upon the jurisdiction of a cause in the midst of a trial, by the first justice; but perhaps it is not impossible to give it even that application. It would certainly involve more difficulties than we are now prepared to meet. But there are two unanswerable reasons, to my mind, why, in the

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present case, no fault is attachable to the defendants for not procuring a justice to assume the jurisdiction of this cause, under the circumstances.

1. If the jurisdiction were to be transferred, it should be done in the precise condition in which the expiration of the official term of the first justice left it. And, in the present case, by consent and agreement of parties, the case continued upon trial for six hours, as a mere arbitration. And if this can be done for that time, it may be extended to any time. The statute evidently makes no provision for another justice assuming the cognizance of a cause which has been even partly tried by arbitration.

2. There is nothing in the act of 1851 which makes it the duty of one party more than the other, to call in a second justice. The defendant, in that action, if he chose to continue the litigation, might as well have called in another justice as the plaintiff; and his not doing it, seems a sufficient indication that he was content to let the matter stop.

The parties seem both to have become wearied of the litigation, and if their ill feeling did not expire with the official life of the justice, they seem, at all events to have given in, and acquiesced in the result.

Judgment reversed and judgment that declaration is insufficient, and that the defendants recover their costs.

 SOLON DANFORTH v. SEBASTIAN R. STREETER.

Abandoning portion of claim to give a justice jurisdiction. Res gestæ. Maintenance and champerty.

A party having a claim in assumpsit for over \$100, may abandon a portion of it or reduce it to a sum less than \$100, and thus be enabled to commence and sustain an action before a justice of the peace for its recovery.

What is said by a person when he goes to call upon another may be given in evidence, as a part of the *res gestæ*; for the purpose of showing the true object and

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character of the act, when the act itself is equivocal, and the person called upon claims for it a different character and effect from that intended.

The terms *maintenance* and *champerty* not applicable to *bona fide* purchases of rights of action;—and, *quære*, whether these offences, as they existed at common law, are recognized in this state.

ASSUMPSIT for money had and received. The action was originally commenced before a justice of the peace, and came to the county court by appeal. Plea, the general issue; trial by jury, May Term, 1855,—UNDERWOOD, J., presiding,

The plaintiff gave evidence tending to prove that, in the early part of the year 1850, a suit was commenced before a justice of the peace, by William W. Myrick against Minot Wheeler, to recover the value of a horse; that the defendant, who was an attorney at law, was employed by Myrick to commence and prosecute said suit; that before the justice, a verdict was rendered in favor of Myrick, and the suit appealed and entered in Windsor county court, at the May Term, 1850, and was continued from term to term to the May Term, 1851, when a final trial was had, and a verdict returned and judgment rendered in favor of Myrick, for \$113.70 damages; that the defendant Streeter received from the defendant in that suit the full amount of said judgment, amounting in all to something more than \$113.00; that in March, 1851, the plaintiff Danforth bought of Myrick the said suit, and agreed to take it, as from the commencement, and prosecute the suit to final judgment, at his own charge and expense, and have to his own use whatever should be received therein, and pay the amount of the defendant Streeter's charge therein, and pay to said Myrick the additional sum of \$30.00; that thereupon the said Myrick and the plaintiff saw the defendant Streeter, and gave him notice that the plaintiff had purchased the suit, and inquired of the defendant what was the amount of his charges in the suit, and was informed by him that he should charge, for his services to that time, the sum of \$10.00; that the plaintiff thereupon agreed to pay the said sum of \$10.00, when the suit should be terminated; that Streeter agreed to wait, and also to furnish his minutes of the testimony before the justice, and to leave said minutes at Tracy & Converse's office in Woodstock; and that the plaintiff then dismissed him from further attendance upon the suit, employed other counsel to conduct the

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suit for him; and that the defendant Streeter was never thereafter employed in said suit, and rendered no services therein at the request of the plaintiff, but received the execution and collected the money thereon without the knowledge or request of the plaintiff, who, upon learning that he had so collected it, called upon the defendant and demanded of him the said money; and that the defendant insisted that he had a claim upon the money for his services in said suit, as to all except the sum of \$50.00, which he offered to pay to Myrick, but refused to pay to the plaintiff.

After the testimony was closed, the defendant moved that the suit be dismissed, for want of original jurisdiction in the magistrate who tried it, insisting that the aforesaid debt, or matter in demand, upon the plaintiff's proof, exceeded the sum of \$100. The court overruled the motion, to which the defendant excepted.^v

The plaintiff also introduced testimony tending to prove that, in the suit of *Myrick v. Wheeler*, at the May Term, 1850, an order was made that the plaintiff furnish additional bail, in the sum of \$75.00, and that the plaintiff consented to become and did become recognized for said Myrick in said sum of \$75.00, upon condition that he should receive security therefor, but it did not appear that said Myrick ever refused to give an indemnity, or that he was afterwards requested to do so, the agreement being rendered inoperative by the sale of the suit, entered into in March, 1851, as above stated.

The defendant gave evidence tending to prove that he never was discharged, by Danforth or Myrick, from further attendance upon said suit, as an attorney, and that, on the contrary, on the day preceding the trial, he was requested by, and that he did thereupon go with the plaintiff, to the office of Tracy & Converse, and inform them in respect to the suit and the testimony; and issued a subpoena for the witnesses, and, the next day, did attend the trial, as an attorney, with Tracy & Converse. The plaintiff, upon this part of the case, insisted that he did not request the defendant to go into the office of Tracy & Converse for consultation, or in any respect as an attorney; but that it had been formerly agreed that the defendant should furnish the minutes of testimony taken by him at the trial before the magistrate, and leave them at Tracy & Converse's office, and that because he had not furnished said minutes, and had

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not them with him, the plaintiff requested the said Streeter to go with him to the office of Tracy & Converse, and state to them, from his recollection, what the testimony was, as given before the magistrate. To prove this, the plaintiff, among other testimony, called Andrew Tracy as a witness, and offered to prove by him that the plaintiff called at the office and inquired if the minutes had been left there, and being informed they had not, left the office to procure them, or get the defendant to come in and state over the testimony given before the magistrate; to this testimony the defendant objected, but the court admitted it, although there was no direct proof that the defendant was notified before or while there, of the plaintiff's purpose of calling him in, nor was there proof that, while in the office, the defendant was notified that he was not consulted as attorney in the suit.

The defendant, among other things, requested the court to charge the jury that the sale of the suit by Myrick to the plaintiff under an agreement that the plaintiff should prosecute the suit for the future, and indemnify Myrick for past costs and expenses, was champertous, illegal and void, and that, therefore, the action could not be sustained in the name of the plaintiff; but the court declined so to charge the jury as requested, to which refusal the defendant excepted.

Washburn & Marsh for the defendant.

There was error in overruling the motion to dismiss. The justice, upon the plaintiff's testimony, had no original jurisdiction of the suit, and consequently, the county court could have no appellate jurisdiction.

The jurisdiction of a justice is confined to suits in which "the debt, or other matter in demand, does not exceed \$100." Comp. Stat. 233, § 20.

The "matter in demand" does not imply the mere claim of the plaintiff, as set forth in his declaration, but is equivalent to what his proof entitles him to demand as the subject matter of his action; *Ladd v. Hill*, 4 Vt. 170; *Southwick v. Merrill*, 3 Vt. 320; *Brush v. Hurlburt*, ib. 46.

The objection to the testimony of the witness, Tracy, was well taken. There was no pretence that the purpose or the declarations of Danforth were communicated to the defendants.

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The sale of the suit by Myrick to Danforth was champertous, illegal and void; *Haloway v. Low*, 7 Port. 488; *Thurston v. Percival*, 1 Pick. 416; *Key v. Vattier*, 1 Ham. 132; *Rust v. Lane*, 4 Litt. 417; *Brown v. Beauchamp*, 5 Moore 416; *Stanley v. Jones*, 7 Bing. 369; Co. Lit. 368 b; Bac. ab. Tit. Maintenance; 4 Kent 449 n. a; *Whittle v. Skinner*, 23 Vt. 531; 2 Pars. on Cont. 263; *Prosser v. Edmonds*, 1 Y. & Coll. 481; *Wilson v. Short*, 6 Hare 384; *Harrington v. Milligan*, 2 Mylne & K. 590; *Webb v. Armstrong*, 5 Humph. 379.

Converse & Barrett for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. This is an action of assumpsit for money had and received. Upon the trial it seemed, from the proof, that the plaintiff might have been entitled to recover a few dollars beyond the amount of the justice's jurisdiction, if he had brought his suit in the county court, and for this reason the defendant moved to dismiss the action. This motion, we think, was correctly overruled. The action being an open action, the plaintiff may, if he choose, reduce his claim in the writ below \$ 100, at his election. The identity of the claim does not depend upon the amount demanded. There can be no possible objection to allowing the plaintiff to abandon a portion of such a demand. It has never been considered that because property was worth above \$ 100, that an action of trespass, or trover, for taking and converting it, must, of necessity, be brought to the county court. The plaintiff may, in such case, set his own price upon the property. So, too, in assumpsit, where there is no express contract, the plaintiff may ordinarily fix the extent of his claim downwards. And even where the jurisdiction depends upon the amount due as in case of notes, it was held, *Herren v. Campbell*, 19 Vt. 23, that the plaintiff might endorse the amount below \$ 100, for the mere purpose of bringing the suit before a justice, and when no payment was in fact made. We think the plaintiff has equal right to abandon a portion of a claim like the present. The judgment is, of course, a bar to the whole, and the case seems to us much more obvious than that of a promissory note.

II. In regard to the proof of plaintiff's declaration, at the time he went to call the defendant into the office of Tracy & Converse, it

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was so far a part of his conduct at the time, that he might show it for the purpose of giving character to his act, which, being equivocal, was relied upon as evidence, against him, of a purpose to continue the defendant in the suit as counsel. We think he was fairly entitled to show all that he did, and all that he said, calculated to give character to his acts, with a view to rebut the inference as to his intention in calling the defendant into the office.

This would not bind the defendant, unless he was, in some way, made aware of the purpose for which he was called into the office. But it is one indispensable step in the process of proof, to show the plaintiff's purpose. If he failed in that, the defendant was of course entitled to treat it, as the plaintiff intended it, as a further employment. But although, if the plaintiff did show his intention not to employ the defendant as counsel, he was compellable to go further and show that the defendant was, in some way, made aware of this, he is, in no sense, bound to prove both points at the same time, or in the same manner. The whole transaction at the office, before he left to call the defendant, seems so intimately connected with the plaintiff's purpose and object, in going to call the defendant, that we think the plaintiff must be allowed to show it, with a view to rebut any inference against him on that account, if he thinks it will have that effect. The jury were to judge in this, as in all such cases, whether the declarations were made *bona fide*, or were a mere ruse to get up evidence upon his own behalf, or for some other intended purpose. It does not occur to us that this is extending the *res gestæ* beyond its acknowledged limits. We think not.

III. Whether there is anything of maintenance or champerty in this case, is undoubtedly a question which might strike different minds differently. Maintenance, according to the text writers, is an officious or unlawful intermeddling with suits, in which one has no interest real or supposed, or the upholding of quarrels by assisting either party with money or otherwise. 4 Bac. Abr. 488. 4 Black. Com. 134. Maintenance seems to embrace champerty and embracery, the former of which is where one assists a party with the agreement to have part of the thing recovered, and the latter is an attempt to further the interests of one or the other party by influencing the jury. So the general term, maintenance, is applied to any assistance which one may unlawfully give either party in a suit.

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But I cannot find that the term maintenance or champerty, has ever, in modern days, certainly, been held to apply to the *bona fide* purchaser of a mere right of action even. Blackstone, indeed, says, "in one sense of the word [champerty] it signifies the purchasing of a suit, or right of suing." But in the same sentence he says, "this is one main reason why a chose in action is not assignable at common law." The learned commentator does not intend here to be understood, that the assignment of a chose in action is maintenance or champerty. No lawyer is, we presume, prepared to contend for any such doctrine. This will cut up, by the roots, half of the business transactions almost, of the most commercial states in the world. The public sense would so revolt at the promulgation of any such doctrine, that if we found it distinctly declared in the common law of England, we should regard it as among the excepted rules, in our adoption of the common law, as not "applicable to our local situation and circumstances," or as "repugnant to our local customs and usages."

But it is evident the writers on this subject have no such understanding of the offences. For in Bacon's Abridgement, under the head of what interest will excuse one for what otherwise would be maintenance, we find "he who has an equitable interest in a chose in action, as the assignee of a bond for a good consideration, may lawfully maintain a suit." Now this is the ordinary case of the assignee of a chose in action. And I apprehend there can be no manner of doubt, that the *bona fide* purchaser of a bond, or notes not negotiable, or other chose in action, which is of the nature of a debt, which is represented to be due, and which the purchaser believes to be due, may sue upon the same, and not incur censure from the law, and that all contracts, founded upon any such consideration, are perfectly valid. The same is true of any aid one may render another in a suit, by way of money or advice, or other lawful assistance, if it be done under a *bona fide* belief in the justice of the cause. It is laid down in Bac. Abr. 491, "one may lawfully give money to a poor man, to enable him to carry on his suit," and every man is poor who has not the means of meeting the expense of enforcing his rights in a court of justice. And of course if one may give, he may lend, with the expectation of being reimbursed out of the avails of the money. And I cannot very well compre-

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hend the difference between a debt and a claim for property attached upon another's debt. It has always been considered that while the property remained *in esse*, the fact of it being out of the possession of the owner, did not preclude the owner from transferring the title, so as to enable the vendee to maintain trover in his own name, against any one who wrongfully withheld the possession. And why, upon principle, it is not equally allowable to transfer the claim *bona fide*, while in suit, so as to enable the purchaser to proceed with the pending suit, is certainly not easy of comprehension.

And this court having decided that the sale and conveyance of land in the adverse possession of a stranger, is a valid contract between the parties, and vests such equitable rights in the grantee as to enable him to pursue the land in the name of the grantor for his own benefit, and that a court of law will take notice of and protect his equitable interest; *Edwards v. Parkhurst*, 21 Vt. 472; it would seem that the chief basis of the old common law offence of maintenance or champerty was reduced within very narrow limits.

The offence certainly does not exist, in form, in this state, unless the common law offence has been adopted as part of the law of this state, which I am reluctant to believe was the purpose of the legislature, unless with some qualifications.

It is no doubt true, that any combination, for the purpose of pursuing protracted causes of action, or such as are not believed to be just, or such, perhaps, as the original parties did not intend to pursue, or the pursuit of such causes of action as are believed to be valid, in a manner and to an extent which the parties could not, or would not do, with a view to unjust gains or unequal advantages, may be still regarded as in the nature of a conspiracy, and so, probably, indictable, and all contracts for the furtherance of such objects wholly void. There are probably other things coming more nearly to the idea of the common law definition of maintenance or champerty, such as carrying on suits for a share of the avails, and thereby increasing litigation, and some others, perhaps, which the law will still regard as champertous, and not countenance.

But the present case does not seem to us of that character.

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Here there is no pretense the claim was not *bona fide*, for it proved valid. There is nothing to show that the purchase was not also in the utmost good faith, or that it, in any sense, changed the character of the prosecution or that it was expected to do so. And, in addition to all this, the plaintiff had before this time, *bona fide*, it would seem, become bail for costs, in conformity with the statute, which implicated him to the fullest extent in the hazards of the litigation. It would be strange if, under these circumstances, he could not assume the entire burden of the suit.

Judgment affirmed.

ISAAC P. MORGAN, DAVID MCCAINE, DANIEL MCCAINE AND
WILLIAM B. BROWN v. DANIEL TARBELL, JR.

Change of partners. Application of payments.

Where a change takes place in a copartnership by the addition of a new member to the firm, and the balance of an account against a customer, which accrued before the change, is carried forward and treated as a part of the account of the new firm, to whom payments are made, which are applicable to their account generally, the payments so made, if the rights of third persons or sureties are not involved, will be applied in satisfaction of the old balance, and not of the account accruing while the payments are being made.

BOOK ACCOUNT. The auditor reported the following facts.

Previous to the 26th of March, 1852, the firm of Morgan, McCaine & Co. consisted of the plaintiffs Morgan and the two McCaines. At that date the plaintiff Brown became a member of the firm by purchasing one-fourth of their property, debts and dues, (the name of the firm remaining unchanged,) and continued a member till the 23d of February, 1853.

The firm of Morgan, McCaine & Co., (as it was composed prior to the 26th of March, 1852,) and the defendant, settled and closed their mutual accounts up to December 1st, 1851, and upon that settlement, the defendant gave his notes for the balance then due.

The charges exhibited by the plaintiffs from December 1st,

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1851, to March 26th, 1852, amounted to \$575.88, and the credits to the same time amounted to \$180.03; the charges from March 26th, 1852, including that day, to February 23d, 1853, amounted to \$706.02, and the credits within the same time amounted to \$735.54.

For a considerable time before the first date in the account presented by the plaintiffs, the firm of Morgan, McCaine & Co. had, at the suggestion and request of the defendant, monthly, at the end of each month, drawn off the defendant's account as it stood on the day-book for that month, and delivered it to the defendant's book-keeper, to be looked over, and errors noted and corrected; and then it was handed back to Morgan, McCaine & Co., and entered on the ledger by aggregating the items; the account being balanced, and the balance of debt or credit entered as the first item on the ledger, in the account for the next month.

This practice of drawing off and furnishing the defendant's account, and making up the account on the ledger, was followed until the deal embraced in the account, presented by the plaintiffs in this case, ceased. At the time of the settlement, December 1st, 1851, the parties examined the account as it stood on the books up to that time, but there was no evidence that the defendant saw the books of Morgan, McCaine & Co. after that time. The account was balanced on the ledger, March 25th, 1852. On the next day William Brown became partner as before stated, and a new ledger, called No. 2, was then commenced, and the balance of debt, as it stood on the 25th of March, as above stated, was charged as the first item against the defendant on ledger No. 2, in the same manner that it had been entered and kept on the former ledger. Brown resided in Boston, Mass., during all the time of the defendant's deal with either of the firms above named, and took no open and active part in the business of Morgan, McCaine & Co. while he was partner, and there was no evidence tending to show that the defendant, during that time, knew that he (Brown) was a member of said firm of Morgan, McCaine & Co.

The credits to the defendant were entered, from time to time, as they accrued. No special direction was given, as to any application to be made of them at the time they accrued, nor at any other time prior to bringing the suit; nor was any application made

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by Morgan, McCaine & Co., except by entering them on their books at the time they accrued.

Upon the facts thus found, the plaintiffs claimed that they were entitled to recover the balance of all the charges over the amount of all the credits,

The defendant claimed that the present plaintiffs were entitled to be allowed only the charges which accrued while Brown was a member of the firm, and that the payments constituting the credits went in discharge of the accounts of the parties constituting the firm at the time the credits accrued.

The county court, May Term, 1855,—UNDERWOOD, J., presiding,—rendered judgment for the plaintiffs for the balance due upon the entire account presented by them, comprising the charges and credits which accrued both before and after Brown became a member of the firm.

Exceptions by the defendant.

J. S. Marcy for the defendant.

When a new partner is admitted into an old firm, and the old partnership name is continued, the new partner is not liable for the prior debts of the firm. *Hart v. Tomlinson*, 2 Vt. 101.

Those only can be joined in the suit as plaintiffs, who were partners at the time the goods were sold; one becoming a partner afterwards cannot be joined, though by agreement of the partners he was to have a share of the profits of sales made previously. 1 Swift's Dig. 347. Story on Part. 365, and cases there cited. Col. on Part. 387.

Without the assent of the debtor, the account of one firm cannot be transferred to another, so as to enable the latter to maintain a suit upon it. Story on Part. 364.

D. C. Denison for the plaintiffs.

I. The incoming partner may join in a suit to recover both old and new debts, when the account has been stated by the parties, including, in the stating, both old and new account. Coll. on Partnership 388.

Of course, where there is any contract or agreement, that the old account may be balanced by transferring it to the new account, the new partnership may, and probably must sue. *Bradley et al.*

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v. *Richardson et al.* 23 Vt. 720. *Eaton et al. v. Whitcomb*, 17 Vt. 641.

The account here was rendered and balanced monthly, and all errors corrected, and balance carried to the new account. This was done several times after Brown came into the firm, including all the old account. An account rendered and acquiesced in is an account stated. *Tharp v. Tharp*, 15 Vt. 105.

II. The credits will be applied by the law to cancel the first items in the account. Payments made, generally, are considered payments made in discharge of the earlier items. Chitty's Contracts 648.

The opinion of the court was delivered by

ISHAM, J. It appears, from the report of the auditor, that Brown became a partner in the firm of Morgan, McCaine & Co., in March, 1852; and at that time there was a considerable balance on account due from the defendant. Brown continued as a partner until February, 1853, when he sold back his interest to the other members of the firm. On the account which accrued while Brown was one of the firm, there was a small balance due from the plaintiffs to the defendant, provided the payments made during that period are applied on the charges which were then made. The present plaintiffs, it is obvious, are not entitled to the judgment which they have recovered, unless the payments made during that time, are first to be applied in satisfaction of the balance which was due from the defendant in March, 1852. In that event, the balance, as reported by the auditor, is due from the defendant to these plaintiffs. The change in the members of the firm, by the introduction of Brown as a partner, produced no alteration in their mode of doing business; the business was continued in the name of Morgan, McCaine & Co. while this account was accruing. During that time Brown was a resident of Boston, in Massachusetts, and took no open or active part in the business of the firm. It was certainly competent for the plaintiffs to have kept the balance due them in March, 1852, distinct from the account which subsequently accrued, and if, in that manner, the continuity of the account had been broken, a general payment should be applied in satisfaction of the subsequent account; such would be the presumed intention of the parties from that circumstance.

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Simpson v. Ingham, 2 Barn. & Cres. 65. *Logan v. Mason*, 6 Watts & Serg. 9. This account, however, was not so kept. It was at the request of the defendant that, for some time before the commencement of this account, and consequently before Brown became a partner, the plaintiffs were in the habit of making monthly statements of the account, as it stood on the day-book, and when examined and corrected by the defendant, the aggregate amount was carried forward to the account for the next month. In that manner the account was balanced in March, 1852, and the balance made the first item of charge in the succeeding month, the same as if there had been no change in the members of the firm. The payments during that period were generally on the account, and for the purpose of paying or reducing the general balance, as no other application of those payments was requested at that time by the defendant. This account, therefore, by the mutual understanding of the parties, has been kept as a continuous, open and current account from its commencement to its close. The balance due in March, 1852, has thereby become blended with the subsequent account between these parties, as if no change in the firm had been made. If the firm had continued the same as it existed previous to March, 1852, no one would question the rule that the payments should be applied to the charges in the order of time in which they were made. The earliest charges are the first to be extinguished by the application of such payments, unless a different application is directed by the debtor at the time of payment. In *Clayton's case*, 1 Merivale 608, it was observed by the master of the rolls that "there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. It is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side. Upon that principle all accounts current are settled and particularly cash accounts." In 1 Am. Lead. Cas. 299, the same rule is recognized, and it is further observed that "this rule will apply to accounts with a partnership, of which there is some change in the members, provided the account goes on as one continuous, open and current account." The case of *Bodenham v. Purchas*, 2 Barn. & Ald. 39, is a strong case upon this subject, and very analogous to this in its facts. In that case a bond was

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given to a firm, conditioned for the repayment of the balance of an account, and of such further sums as should be advanced to the obligor. One of the partners died, and a new partner was taken into the firm; at that time a considerable balance was due from the obligor to the firm; advances were afterwards made by the firm, and payments made to them, on account, by the obligor, and he was credited by the new firm with the several payments, and charged with the original debt and advances, as constituting items in one entire account. It was held, that as the old balance was not treated as a distinct account, but having been carried forward and blended in the general account with other transactions, they were not at liberty, at a subsequent period, to treat it otherwise; and that having received, in different payments, a sum more than was sufficient to pay the debt, when the change in the firm took place, the bond was considered as paid. If the rights of third persons or sureties were involved in this matter, or if, for any other reason, the plaintiffs in this case were now desirous of separating that balance, and applying the payments in satisfaction of the charges made after Brown became one of the firm, it is clear, from the authorities, that they would not be allowed to do it. Having carried the balance due in March, 1852, forward, and added it to the amount of the succeeding account, he has not only the right, but would be compelled, even against his interest, to have that balance satisfied by the application of the subsequent payments which were made on the account. *Smith v. Wigley*, 3 Moore & Scott 174. *Simpson v. Ingham*, 2 Barn. & Cres. 65. *Henniker v. Wigg*, 4 Adol. & Ellis, N. S. 792. In *The United States v. Kirkpatrick*, 9 Wheat. 737, it was said by the court that, if both parties omit to make an application of payments, "the law will apply them according to its own notions of justice," and in making that disposition, regard will be had to the character of the claims, the rights of sureties, and all circumstances showing the intention of the parties. *United States v. Wardell*, 5 Mason 82. *Field v. Holland*, 6 Cranch 27. *Smith Mer. Law* 636-7-8. 2 Greenl. Ev. This case not involving any of those considerations, affecting the rights of third persons or sureties, we think it must be governed by the rule as established in the case of *Bodenham v. Purchas*.

The judgment of the county court is affirmed.

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CARLTON AND ——— MANNING v. GEORGE S.
COFFIN, ABRAHAM ADAMS, SHEPHERD ADAMS, PERLEY S.
COFFIN AND ALBERT DAY.

Evidence to prove partnership. Statute of limitations. Partnership.

To prove that a person was a member of a firm, testimony showing that he had a deed of an undivided portion of their property, and that, with his knowledge, suits at law and in chancery respecting said property were instituted by and in the name of the firm in which he was joined as plaintiff, and that he took an active part in advising about, and in making repairs upon said property, is admissible.

If a partner, who is the agent of the firm for making disbursements, &c., make a payment, as such agent, upon a promissory note previously given by the firm, it will be presumed to have been made out of the partnership funds, and will prevent the running of the statute of limitations against all the partners. Such a payment is to be treated as a payment by all of the firm on their joint account, and not as that of the paying partner only.

ASSUMPSIT upon a promissory note, dated March 12, 1845, for \$385.78, payable on demand, signed, "For the Ludlow Woolen Mill, George S. Coffin, agent." The defendants were described in the writ as "formerly co-partners in the manufacturing business at Ludlow, under the firm and style of the Ludlow Woolen Mill." Plea, the general issue, and the statute of limitations; trial by the court, by agreement of the parties, May Term, 1855,—UNDERWOOD, J., presiding.

The plaintiffs put into the case a copy of a deed, from Wm. Sturges and others to George S. Coffin and Shepherd Adams, dated 21st October, 1843, of about 4 acres of land in Ludlow, with the factory and other buildings thereon; also a copy of a deed from G. S. Coffin to Albert Day, dated 15th December, 1843, of two tenths of the Woolen Mill, &c; also a copy of a deed from George S. Coffin to P. S. Coffin, same date, of one tenth of said mill, &c; also a copy of a deed, Shepherd Adams to Abraham Adams, dated 16th November, 1843, of one-half of his interest in the factory, &c; also a bill in chancery, Abraham Adams, Shepherd Adams and Albert Day v. Jacob Patrick filed in the clerk's office, December 18th, 1847, and sworn to by Abraham Adams. The foregoing deeds and bill were offered with other testimony to show that Abraham Adams was one of the partners of said firm, called "Ludlow Woolen Mill." The defendants objected to receiving, but the court admitted them; to which the defendants excepted.

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The plaintiffs also put into the case a writ in favor of Abraham Adams, Shepherd Adams, Perley S. Coffin and Albert Day against Warner, Manning and others, for the same purpose, having proved that the said Abraham caused said writ to be made; to the receipt of which the defendants also objected, but the court admitted it, and the defendants excepted.

It appeared from the evidence that the note in suit was given for repairs on the woolen mill, from the fall of 1843 to the fall of 1844; and that in making said repairs, and in advising about the same, Abraham Adams took an active part, and also took an active part in the manufacturing at the mill; but to the testimony going to show Abraham Adams' connection with the same, the defendants objected, but the court admitted it, and the defendants excepted.

The defendants put into the case articles of partnership, signed by Shepherd Adams, George S. Coffin, Albert Day and Perley S. Coffin, professing to be the proprietors of the brick factory at Ludlow, associating themselves under the name of Ludlow Woolen Mill, dated December 16th, 1843; and it appeared that Abraham Adams signed this paper with the others at the time it was executed, but that his name, after two months, was rubbed out for the alleged reason that a bill in chancery was commenced against the Green Mountain Company, charging said Abraham as a partner, and it was thought best that his name should not appear as one of the firm of the woolen mill, until that suit was ended.

It appeared that the said Abraham Adams took an active part, and was engaged in the business of the woolen mill, from December 1843 to 1847, buying wool and attending to repairs, &c.

From the conduct of said Abraham in the business before referred to, the several deeds and papers put into the case, the bill in chancery sworn to by him, and the writ procured by him to be made, the court found that said Abraham was, in point of fact, a partner from the time of the executing of said articles of partnership, until after the signing of the note in suit, and one of the firm of the woolen mill company.

As to the statute of limitations, the plaintiffs put into the case testimony tending to show the general agency of Shepherd Adams in the affairs of the company, and it appeared from the testimony

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in the case that he was their agent to make disbursements, &c.; and that on the first day of June, 1846, he, as agent of the company, made a payment of fifty dollars in money on the note in suit, which was then endorsed on the same; and thereupon the court rendered judgment for the plaintiffs to recover the balance of said note.

To the admission of testimony by the court as aforesaid, and to the judgment so rendered, the defendants excepted.

Converse & Barrett for the defendants.

I. The copies of deeds, bill in chancery, and writs were improperly received.

The deeds and bill in chancery concerned the real estate only, and could furnish no evidence of a co-partnership in the manufacturing business.

II. The testimony did not authorize the conclusion in law, that the statute bar was removed. The agent, without special authority for that purpose, had no power to acknowledge a debt, so as to remove the statute bar. The making a payment on the note by the defendant himself, is only an acknowledgment; and the legal effect is precisely the same as though the party, instead of making a payment on the note, had acknowledged that it was fairly due.

III. Shepherd Adams was a joint contractor in said note; a payment by him, therefore, was as such joint contractor, and could not affect his fellow contractors; Comp. Stat. 381 §26. Neither could his acknowledgement of the debt have any effect upon the statute as to the other contractors; Comp. Stat. 380 §22.

S. Fullam for the plaintiffs.

The opinion of the court was delivered by

BENNETT, J. The first question in the case is, had the county court competent testimony before them, tending to prove that Abraham Adams was one of the partners of the Ludlow Woolen Mill Company at the time of the execution of the note, which bears date the 12th of March, 1845. We see no objection to the admissibility of any of the evidence admitted by the county court. Its weight was entirely with that court. The evidence went to show that on

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the 16th day of December, 1843, all the defendants in this suit, including Abraham Adams, who styled themselves "proprietors of the brick factory in Ludlow," entered into written articles of agreement to transact business under the name of the "Ludlow Woolen Mill," and appointed G. S. Griffin their general agent, and gave him authority to sign notes, &c. Abraham Adams signed this agreement with the others; and the case finds that after the expiration of two months his name was erased from this agreement for the reasons alleged in the bill of exceptions, and the question of fact was whether, notwithstanding this, he continued one of the company in interest, down to the giving of the note in question. The plaintiff was entitled to prove any facts which had a tendency to show a continuation of interest in Abraham Adams in the concern. We see no objection to the proof that Abraham Adams held a deed of an undivided portion of the factory property, followed up with the other testimony. The bill in chancery referred to in the exceptions, was brought in the month of December, 1847, in the name of Abraham Adams and the others, as the alleged owners of the factory, &c; and the bill was sworn to by Abraham Adams. We think the facts stated in the bill, and which may be referred to, had a direct tendency to show a continuing interest in Abraham Adams, in the concern, notwithstanding the erasure of his name from the written articles of agreement.

The writ which was given in evidence was procured by Abraham Adams, and it alleges that all the defendants to this suit were the joint owners of this woolen factory; and the object of the suit was to recover damages done to their factory privileges. We think this was competent proof, equally with the bill in chancery.

The fact that Abraham Adams took an active part in advising about, and in making the repairs upon the mill, for which the note in question was given; and also in the business of the mill, is just what we should expect, if he continued to have a joint interest in the concern; but otherwise, not, unless he was made the agent of the concern, and this was not pretended.

In respect to the plea of the statute of limitation, the fifty dollars was indorsed on the note the first of June, 1846, and the suit was commenced within six years from that date. The exceptions find that Shepherd Adams, one of the company, was their agent for

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making disbursements, &c; and that, as agent of the company, he paid the fifty dollars; and the fair intendment is, that it was paid out of the joint funds of the company. This is not to be treated as a case where a payment is made by an individual member of a firm; but it was a payment by the entire firm on their joint account, and out of their joint fund. It is not within the provision of the act, which declares that the payment of one joint contractor shall not affect the liability of the other contractors, so as to deprive them of the benefit of the statute of limitation.

Judgment affirmed.

THE STATE OF VERMONT v. FERRIS COMINGS.

Sale of intoxicating liquors.

The respondent, a citizen of New Hampshire, having his only place of business in that state, there contracted to sell to a resident in this state a part of a cask of brandy, which was then in this state *in transitu* from New York to New Hampshire. The purchaser, by permission of the respondent, obtained the cask from the railroad depot in this state, where it then was, and took it to his residence, where he was to take from it what he wanted and carry the cask with what remained to the respondent's store in New Hampshire, where the quantity taken was to be ascertained by a measurement of that which remained, and be there paid for. *Held*, that this constituted an offense against the act of 1852 to prevent the traffic in intoxicating liquors.

INDICTMENT for a violation of the statute of 1852, entitled "an act to prevent traffic in intoxicating liquors for the purpose of drinking." Plea, not guilty; tried at the May Term, 1855,—UNDERWOOD, J., presiding.

Evidence was introduced on the part of the prosecution tending to prove that the respondent, in September, 1854, sold a cask of brandy to one John P. Williams, at White River Junction. The respondent gave evidence tending to prove that he was a citizen of the state of New Hampshire, doing business as a merchant at West Lebanon in that state, having there his only place of business; that the cask of brandy in question had been forwarded to him from New York, by railroad; and was, at the time in question,

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at the freight depot of the Vermont Central railroad, at White River Junction; that all freight received by him, from New York, was necessarily directed to him at White River Junction, for the reason that the Vermont Central Railroad Company had no station at West Lebanon; and that he was accustomed to receive it from the Junction by the cars of the Northern Railroad Company running across Connecticut river; that, at the time in question, the said John P. Williams came to the respondent's store in West Lebanon, and there purchased the brandy, which he was charged with having sold; that it was then and there agreed between them that Williams should take the cask of brandy from the depot at White River Junction to his house, which was in this state, and take from the cask so much of the brandy as he might wish, and return the cask, with the residue of the brandy, to the respondent's store in West Lebanon, where the quantity taken should be determined by measuring the quantity left in the cask, and that said Williams should then pay to the respondent, at his said store in West Lebanon, the money for the brandy so by him taken and used; that the respondent thereupon sent his clerk to the freight depot at White River Junction, with Williams, to direct the station agent of the Vermont Central Railroad Company to deliver the cask to said Williams, and that said Williams took the cask of brandy from the depot to his house, and there took and used a quantity of the brandy therefrom.

The respondent requested the court to instruct the jury that, if they believed the testimony on the part of the respondent, he was not guilty of the crime alleged; but the court declined so to charge, and instructed the jury that, although the contract was made, and payment was to be made, in the state of New Hampshire, as the respondent's testimony tended to prove, yet that the respondent's testimony also tended to prove that the brandy was delivered by Comings to Williams, within this state, and that, if the brandy was thus delivered in Vermont, it would be a violation of our statute, for which the respondent was liable. To this charge and the refusal to charge as requested, the respondent excepted.

P. T. Washburn for the respondent.

The testimony on the part of the respondent showed a *sale* of

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brandy by him to Williams; and the question is, whether it was a sale at a place within this state. If it was not, the respondent was entitled to the charge requested.

The contract of sale was completed in New Hampshire, and, by its terms, payment was to be made there at a future day. The title and right to the possession of the property thereby vested immediately in Williams, without further act; *Evarts v. Butler*, Brayt. 216; *Towsley v. Dana*, 1 Aik. 344; Long on Sales 261; *Hutchins v. Gilchrist*, 23 Vt. 86; *Crawshaw v. Homfray*, 4 B. & Ald. 50. And this is not affected by the provision that the amount sold should be ascertained at a future day, for the reason that the parties contemplated, as part of the agreement, that the contract should be complete immediately; *Riddle v. Varnum*, 20 Pick. 280. It was, therefore, a sale in New Hampshire, but not in Vermont.

But, if the court were correct, in deciding that the brandy was delivered in Vermont, that does not make it a sale in Vermont. The contract was made in New Hampshire, and payment was to be made there. It was, then, a contract completed in New Hampshire, and governed, in all respects, by the law of that state.

The brandy was not on deposit in Vermont, for sale, but was in transit to the respondent's place of business, in New Hampshire; and the contract should be treated the same as though it had reached its place of destination; for contracts in respect to movables are to be construed according to the law of the place where they are made; 1 Pars. on Cont. 83.

In *Territt v. Bartlett*, 21 Vt. 184, and *Smith v. Allen*, 23 Vt. 298, the contract of sale was made in Vermont, and the delivery was in New York; and it was held that "*the contract was complete in this state.*" And this is in accordance with the rule, as stated in 1 Pars. on Cont. 97.

In this case, the contract was in New Hampshire, and the delivery in this state; and, applying the same principle, for the benefit of the vendor, which was held applicable against him in *Territt v. Bartlett* and *Smith v. Allen*, "*the contract of sale was complete*" in New Hampshire; and, the respondent, a citizen of New Hampshire, cannot be indicted here.

James Barrett, state's attorney, for the prosecution.

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The opinion of the court was delivered by

REDFIELD, CH. J. The conviction, in this case, being of a resident in another state, where there was no apparent intention of transacting business within this state, in violation of the statute, one would rather desire to excuse the act, if it can be done, consistently with the rules of law applicable to the subject.

But, it seems to us, the respondent must be regarded as accessory to the furnishing of this liquor to the vendee in this state. The guilt or innocence of the respondent cannot be determined by his intention. If he do an act which is prohibited by the law, he is liable to conviction, notwithstanding he might have verily believed he was keeping altogether within the requirements of the law. There can be no doubt whatever, that one, who is a dealer in spirits, might give such article to a sick person under circumstances which morally, aside of the statute, were as innocent as possible, or even as commendable as the office of the good Samaritan, and still it be an offence under the statute. It is impossible to except such cases and not give opportunity for evasions which might altogether destroy the beneficial operation of the statute.

In the present case, the spirit, certainly, was delivered in this state, through the instrumentality of others, but by the respondent's procurement. He is then liable to the same extent he would have been if he had himself made the delivery in this state, all accessories being principals, in misdemeanor. If we regard the *contract* of sale as virtually made in New Hampshire, as we must, perhaps, the delivery was as certainly in this state. For, until the separation of what Williams took, he could not be said to be the owner of any portion of the mass, inasmuch as he was to take what he chose, and, if he did not take any, there was no sale of any. It is not like some of the cases referred to, where the vendee agrees for a specific quantity, not separated from the mass, and pays the price, and agrees to the immediate vesting of the title, before the measurement. For here, no quantity was agreed upon, or any price paid, or anything else done, to indicate the purpose of the parties to have the title pass until the separation.

It was, then, clearly putting the spirits in the power of Williams, in this state. The sale was really consummated in this state, and

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so, for all the purposes of the prohibition, might very well be treated as made here.

If they had a similar law in New Hampshire, it could scarcely be claimed that what was done there, constituted the offence there. And one sale could scarcely be so evenly divided, one would think, as to constitute no offence in either state. It is the delivery which seems the more essential act in the offence. The sale, without the delivery, would be no offence, *i. e.*, no sufficient ground of conviction. It would be so far illegal as to render the contract void, as was held in *Territt v. Bartlett*, 21 Vt. 184. But that does not show always enough to convict of the offence, as was said at the bar, in regard to aiding in smuggling brandy in ankers; *Briggs v. Lawrence*, 3 T. R. 454; see also *Holman v. Johnson*, Cowper 341. The delivery, without a sale, is an offence; so that whether this is called a sale or not, in this state, the offence is complete. It clearly is, if not a sale here, a furnishing of spirits by one who is a dealer, and who does it for gain and emolument. We think, therefore, the conviction was proper.

Exceptions overruled, and respondent to pay fine of \$10, and costs.

THE STATE OF VERMONT v. LEVI K. JOHNSON.

Rape. Incest. Evidence.

Upon a trial upon an indictment for rape or incest, if the person upon whom the offence is charged to have been committed is examined as a witness for the prosecution, she may be inquired of, upon cross-examination, whether she had not, at certain specified times and places, had sexual intercourse with other men whose names are mentioned. *BENNETT, J.*, dissenting.

Quære, whether the witness would be bound to answer such an inquiry.

Indictment, in three counts, for rape and incest. Plea, not guilty; trial by jury, May Term, 1855,—*UNDERWOOD, J.*, presiding.

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The state's attorney called, as a witness, Sarah E. Johnson, named in the indictment, and alleged to be the daughter of the respondent, whose testimony tended to prove the allegations in the indictment, and that the respondent had had sexual connection with her at three several times, and that she had been delivered of a child in consequence thereof.

Upon cross-examination, the counsel for the respondent proposed to inquire of the witness whether she had had sexual intercourse with men, other than the respondent, and particularly whether she had had such intercourse with particular men, (naming them) at particular times and places, (specifying them,) previous to the time when, as she testified, the respondent had intercourse with her, and also after that time, and before she discovered she was pregnant. To this testimony the state's attorney objected, and the court refused to allow the question to be put to the witness. To this decision the respondent excepted. The jury returned a verdict of guilty.

Washburn & Marsh for the respondent.

J. Barrett, state's attorney, for the prosecution.

The question as to intercourse with other men was properly ruled out. *Roscoe Cr. Ev.* 801; 1 *Phil. Ev.* (Cow. & Hill's ed.) 176; 3 *Green. Ev.* 195, § 214.

The opinion of the court was delivered by

ISHAM, J. In prosecutions for offences mentioned in this indictment, the prosecutrix is, from necessity, a competent witness for the state. The credibility of her testimony, however, and her general character for truth, as well as for chastity, are matters involved in the trial of the case, and are exclusively to be determined by the jury. 2 *Arch. C. P.* 307. On the counts in which the respondent is charged with the crime of rape, we think the inquiry proposed to the prosecutrix, on her cross-examination, whether she had not had sexual intercourse with other men, both before and after the time in which she had testified the offences were committed, was proper, and should have been allowed. The inquiry was particular in specifying the names of the persons with whom, and the places where such connections were had. In all cases of

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this character, the assent of the witness to the act is the material matter in issue, and on that question the defense generally rests on circumstantial testimony. In determining that question, which is purely a mental act, it is important to ascertain whether her consent would, from her previous habits, be the natural result of her mind, or whether it would be inconsistent with her previous life, and repugnant to all her moral feelings. Such habits as are imputed to the witness by this inquiry, have a tendency to show such consent, as the natural operation of her propensities, and rebut the inference or necessity of actual violence. It is upon this principle that the authorities in England and in this country are uniform in holding that it is competent for the respondent, without any cross-examination of the witness, to introduce witnesses showing that the prosecutrix is a woman of ill fame, of general lightness of character, a street-walker, and that she associates with persons of lewd and dissolute character. *Roscoe Cr. Ev.* 801. *Arch C. P.* 307. *3 Stark. Ev.* 951. *Rex v. Clarke*, 2 Starkie N. P. C. 241. *State v. Camp*, 3 Georgia 419. *People v. Abbott*, 19 Wend. 192. *State v. Jefferson*, 6 Iredell 805. Those cases are founded upon the principle that such testimony is competent, not merely for the purpose of impeaching her general character for truth, but to show on her part, a corrupted mind, from which her consent to such an act is the natural result of her inclinations. It certainly would require less proof on such evidence to rebut her testimony of actual violence, than it would where the mind and moral sensibilities of the witness are uncorrupted by such habits. A jury would be warranted on such testimony, in finding her consent from slight circumstances, and, ordinarily, a conviction would not be justified on her uncorroberated testimony. But when the character of the prosecutrix is unaffected by such considerations, her testimony showing actual violence, and that no consent was given, would not be overcome but by strong and almost irrefragible proof. If the fact, that the witness is a woman of bad fame, can be shown by the respondent, by introducing witnesses showing her general character, it would seem to follow, as a necessary consequence, that it is competent to prove the same fact on the cross-examination of the prosecutrix, by inquiring into the particular facts upon which her general character is founded; as observed by WILLIAMS, J., in *Rex*

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v. *Martin*, 6 Carr. & Payne 562, "the doctrine that you may go into general evidence of bad character in the prosecutrix, and yet not cross examine into the specific facts, I confess, does appear to me to be not in strict accordance with the general rules of evidence." If, in proof of the bad character of the prosecutrix, the respondent relies upon witnesses introduced by him for that purpose, he will be confined to the proof of her general character, and will not be permitted to prove specific facts, as it is not to be presumed that the state can be prepared to meet or explain those particular events in her life. But where the prosecutrix is a witness, and the inquiry is directed to her on cross-examination, that reason does not exist, nor does the principle apply, as the presumption in such case arises that, in relation to such specific facts, she is able to give satisfactory explanations, if such explanations can be made. Whether the prosecutrix would be bound to answer such inquiries, as being matters tending to her disgrace, is not the question before us. The question, now, is not one of privilege. It was not upon that ground the inquiry was denied, but the inquiry was held improper when no such privilege was interposed. In such case, we apprehend, the authorities in England and in this country are decisive that it is competent for the respondent, on the cross-examination of the prosecutrix, to make the proposed inquiry. In the case *People v. Abbott*, 19 Wend. 192, it was held, that "on the trial of a person charged with the crime of rape, the inquiry may be made of the prosecutrix whether she had previous connection with other men, and that she, in such case, is not privileged from answering." The subject was examined by JUSTICE COWEN, with his usual learning and research, both on principle and authority; and it is sufficient to refer to the opinion and reasoning of the court in that case, as fully expressing the views we now entertain on this question. That is the only case in this country which we have been able to find, in which this question has directly arisen. The cases of *Rex v. Hodgson*, Rus. & R. C. C. 211; 3 Carr. & Payne 589, note (a), and *Rex v. Clarke*, 2 Starkie N. P. C. 241, both decided in 1812, are relied upon as establishing the principle that such inquiries are improper. In the first case, as reported in 3 Carr. & Payne, the question now before us does not appear to have arisen in the case, and the court expressed no opinion upon

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it. The case was an indictment for rape, and the prosecutrix was inquired of, on her cross-examination, whether she had not before had connection with other persons, and with a particular person named. WOOD, B., held, that "she was not bound to answer these questions;" and this opinion was confirmed by the twelve judges. The decision of the court was upon the mere question of privilege, and not that the inquiry was improper, when the privilege of the witness is not interposed. The prisoner then offered to prove, by witnesses, particular facts not connected with the present charge. But for the reasons which have been stated, such evidence was clearly inadmissible. That is the view taken of this case in Roscoe's C. Ev. 164, in which he says, "it does not appear whether the question itself was objected to, or only that the witness was not bound to answer it." He thinks the witness was privileged, as it imputed to her an offense punishable by the ecclesiastical law. In that view of it, the case has no bearing on the question now before us.

The case of *Rex v. Clarke*, was an indictment for an assault, with intent to commit a rape. On the cross-examination of the prosecutrix, she was asked whether she had not been sent twice to the house of correction for having stolen money from her master several years previous. No question of privilege being interposed, she admitted that she had been, and was then permitted to remove the impeachment, by showing her subsequent good character. The prisoner then proposed to call witnesses to impeach her character for chastity, both generally and particularly. The court admitted the evidence as to her general character, but rejected the evidence of particular facts. There was no offer to inquire of the prosecutrix, on her cross-examination, in relation to those particular facts, nor was there any decision of the court that such an inquiry would be improper. It would seem to be as proper as to inquire of her, whether she had not been confined in the house of correction for larceny.

But if we are to consider these cases as having decided the doctrine as contended for by the counsel for the state, and in that light, by some authors, they have been so considered, it is very clear that, to that extent, those cases are not now regarded as of binding authority in the English courts. The case of *Rex v. Barker*, §

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Carr. & Payne 589, decided in 1829, was an indictment for rape in which it was held by JUSTICE PARKE, after consultation, that it was competent for the prisoner to inquire of the prosecutrix, whether "she were not on Friday walking the High street of Oxford, to look out for men; and whether she was not walking, on Friday last, in the High street, with a woman reputed to be a common prostitute." The case, it will be perceived, was decided, after a particular reference to the case of *Rex v. Hodgson*. In the case of *Rex v. Martin*, 6 Carr. & Payne 562, decided in 1834, it was observed by WILLIAMS, J., "I was counsel in the case of *Rex v. Hodgson*. The question in the present case is as to previous intercourse with the prisoner, and the question there was as to previous intercourse with other men. I shall certainly receive the evidence, and I must say that I never could understand the case of *Rex v. Hodgson*." In the case of *Rex v. Aspinwall*, 6 Carr. & Payne 562, note (a), it was held, that "the prisoner might show that the prosecutrix had been previously criminally connected with himself. The circumstances that the prosecutrix was in the streets of Oxford, looking for men, that she was in company with women of ill fame, and that she had had previous connections with the prisoner, are all particular facts, and were not connected with the charges then made, and concerning which the prisoner was permitted to inquire of the prosecutrix, on her cross examination. In an action for seducing the plaintiff's daughter, she may be cross-examined as to the particular acts of intercourse with other men, and if she deny them, then such persons may be called to contradict her, and may be asked as to the fact, and time, and place of the occurrence. *Verry v. Watkins*, 7 Carr. & Payne 308. When the general rule is given in the authorities, that evidence of particular facts is not admissible, reference is had to cases where witnesses for that purpose, are introduced by the respondent; and not to cases where the prosecutrix is a witness on the part of the state, and the inquiry is directed personally to her, on her cross-examination. In such case, we think, the inquiry may be properly made, and that the authorities fully sustain the rule on this question, as it was held in the case of *The People v. Abbott*, 19 Wend. 192.

The testimony of Sarah E. Johnson was also used on the count charging the respondent with the crime of incest. The birth

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of a child, which she swore was the result of that intercourse, was one circumstance relied upon as a proof of his guilt. The fact that she had such intercourse with other men, at and about the time the child was begotten, has a strong tendency to impeach her testimony in that particular, and to rebut the evidence of the respondent's guilt, arising from that circumstance. In prosecutions for bastardy, when a person is charged by the oath of the woman with being the father of the child, such testimony has always been held admissible to rebut her testimony, as to his being the father. *Lord v. Schevering*, Thatcher C. C. 26. *Ginn v. Commonwealth*, 5 Litt 300. *Fall v. Overseers &c.*, 3 Mumf. 495. The witness may be interrogated on her cross examination as to the particular persons with whom such connections were had, and the time and places of their occurrence. The state, having proved the birth of the child, and relied upon that circumstance as evidence of the respondent's guilt, we see no more objection to such inquiries being made on her cross-examination, than in prosecutions for bastardy. New trial granted.

BENNETT, J., dissenting. I cannot concur in the opinion expressed by a majority of the court. It is to be conceded, that in prosecutions of this kind, the general character of the prosecutrix for chastity is involved, and put in issue, and the rule relative to the impeachment of her character, in this respect, is thus summed up in Greenleaf's Ev. vol. 3, § 214. "It must be done by general evidence of her reputation, in that respect, and not by evidence of particular instances of unchastity, nor can she be interrogated as to a criminal connection with any other person, except as to her previous intercourse with the prisoner himself." The rule is substantially the same in all the elementary writers upon evidence that I have been called upon to examine. A general want of chastity may furnish a basis for a presumption that the illicit connection was by consent, and thus it becomes material to the issue. But no such presumption should be allowed to arise from a particular instance of an illicit connection with another person. Presumptions cannot rest upon mere suggestion or surmise. They must have some ground to stand upon, some facts upon which they can arise. I

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am fully aware that in the case of *The People v. Abbott*, 19 Wend. 192, the law is claimed to be, that in prosecutions of this kind, the defendant may prove a particular instance of a previous illicit connection between the prosecutrix and another person, and that such fact may be proved upon a cross-examination of the prosecutrix, or by any other witness. I must say, that I consider the case in the 19 Wendell, as a departure from the English law upon this subject, and as theoretical, and unsound in principle, and, for one, I have no disposition to follow the lead of that case. The error in that case, in my view, is, in assuming that a presumption of consent might arise from the fact of a previous illicit connection with some other person, and when JUDGE COWEN undertook to dispose of the cases of *Rex v. Hodgson* and *Rex v. Clark*, as being overruled by the laws of human nature, I think he undertook too much. Though we may concede, so far as our moral convictions are concerned, to use the language of JUDGE COWEN, that "one who has already started on the road to prostitution, would be less reluctant to pursue her course, than one who still remained at her home of innocence," yet courts of justice cannot act upon evidence addressed simply to their moral convictions. It might, no doubt, have an effect upon our moral convictions, to show on a trial for theft, that the defendant was given to stealing, yet courts of justice could not act upon such a fact, and why should we presume that a female continues in a voluntary course of lewdness, because she has had, at some previous time, a sexual connection with some other man. If the law will not allow such evidence to be the basis of a presumption, it should not be received. In *Rex v. Hodgson*, Russell & Ryan's Crown Cases 211, and in *Rex v. Clark*, 2 Stark. 241, it was expressly held that evidence of particular acts of intercourse between the prosecutrix and other persons, could not be shown by the defendant.

In the case of the *The State v. Jefferson*, 6 Iredell 305, the court of North Carolina, upon the authority of those cases, excluded, as irrelevant to the issue, particular acts of familiarity with other men, and this was the very point in judgment in that case. The only point decided in *Camp v. The State of Georgia*, 3 Kel. 419, was, that general evidence of want of chastity was admissible.

It is said in the case of *The People v. Abbott*, in Wendell, that

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the cases of *Rex v. Hodgson*, and *Rex v. Clark*, have been given up in England, but, to my mind, the remark is gratuitous. The cases which show that a previous connection with the defendant himself is admissible, stand upon that peculiar ground, and such was the case of *Rex v. Aspinwall*, 2 Starkie's Ev. 700, and also the case of *Rex v. The Martins*, 6 Carr. & Payne 562. This latter case goes no further. Though WILLIAMS, J., in this latter case, remarked that he was counsel in the case of *Rex v. Hodgson*, and could never understand that case, yet that does not show that that case has ever been given up or shaken in England. The case of *Rex v. The Martins*, was at *nisi prius*, and no such question was before the court as was decided in *Rex v. Hodgson*, and it is no uncommon thing for counsel not to be able to comprehend a decision adverse to their client.

The very nature of things show, that previous acts of familiarity between the prosecutrix and the prisoner, stand upon that peculiar ground, and are competent, as tending to prove consent. In the case of *Regina v. Cloys*, 5 Cox's Crown Cases 146, decided in 1851, the learned counsel for the prisoner conceded the law to be, that he could not go into particular acts. It can hardly be supposed that this concession would have been made, if *Rex v. Hodgson* and *Rex v. Clark*, had been given up in England. It has been said that the case of *Rex v. Barker*, 3 Carr. & Payne 589, shows that proof of particular facts may be given in evidence, and is opposed to *Rex v. Hodgson* and *Rex v. Clark*. But I think not. In the case in the 19th Wendell, the case of *Rex v. Barker* is treated as an authority to show that general evidence of bad character, as to chastity, may be received, and the case is viewed in the same light by PATTERSON, J., in *Regina v. Cloys*, 5 Cox's Crown Cases: Though PARKE, J., who tried the case of *Rex v. Barker*, at first thought that to permit the prosecutrix to be inquired of whether she was not, on a particular day, walking in High street of Oxford, to look out for men, with a woman reputed to be a common prostitute, would be to conflict with *Rex v. Hodgson*, and *Rex v. Clark*, and allow particular acts to be proved, but upon consultation, the inquiry was allowed to be put, and I think correctly. It was proving something more than particular acts. High street, no doubt, was understood to be a common resort for

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women of ill fame, and would be avoided by all virtuous women, and if a female was found walking in that street to look out for men, in company with a woman reputed to be a common prostitute, it would tend to show that she also was a common prostitute, and in character, it would be the same thing as to show she was an inmate of a house of ill fame. That this case stands upon the ground, that the facts offered to be proved went to show a general want of chastity, would seem to follow, from the fact that the inquiry was not confined to a time previous to the alleged rape. If it was regarded as evidence of a particular fact, the court would no doubt, have confined the counsel to acts previous to the alleged offence, if they had decided to admit the testimony at all. In *The People v. Abbott*, the evidence was confined to a previous connection. So it is in the civil actions for seduction. See *Elsam v. Faucett*, 2 Espinasse 562; *Cook v. Berty*, 12 Modern 232.

In cases of seduction the defendant may prove on trial that the daughter has been previously criminal with other persons, and such is the case of *Verry v. Watkins*, 7 Carr. & Payne, 308; but it is only admissible on the question of damages.

The plaintiff cannot object to the proof of such facts by witnesses called by the defendant on the ground of surprise. She is bound to come prepared to meet them, they being pertinent on the question of damages. But in an indictment for a rape, such prior acts of criminal conduct are not competent under the issue. If they were, the government attorney could not claim to reject them on the ground of surprise. To preclude the defendant from proving such facts by witnesses by him called, on the ground of surprise to the other party, and yet permit him to prove the same facts upon a cross examination of the prosecutrix, looks to me like judicial trifling. If the defendant cannot prove a prior connection between the prosecutrix and a third person, by witnesses by him called, it must, I think, follow, from principle, that he could not prove the same facts by the prosecutrix herself.

It is equally immaterial to the issue in either case; and it is, in my mind, of no importance from what source it is sought to make proof of the fact.

With this view, I have no occasion to examine the question of

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privilege, and to see whether, if it existed in the present case, it was properly called into exercise in behalf of the witness.

The attorney for the government objected to the questions put to the witness; and the court refused to allow the question to be put.

It is assumed that the privilege of the witness being personal, it would be error in a court to exclude a question material to the issue, and which the witness was not bound to answer, unless the witness first claimed her privilege. But I hold it to be the duty of the court to protect a witness; and when a question is put to one, though it may be material to the issue, which upon its face he is not bound to answer, the court may, upon its own mere motion, or upon motion of counsel, refuse to allow the question to be put to the witness. This has been the usual practice at *nisi prius*. See *Rex v. Hodgson*, R. & R. 211; *Dodd v. Norris*, 3 Camp. 519; *Rex v. Lewis*, 4 Espinasse 222; *Cundell v. Pratt*, 1 M. & Malk. 108. If the witness remains mute, it may well be considered he adopts the claim of privilege made in his behalf.

If the witness waives his privilege, he should be examined. If it was necessary to sustain the ruling of the county court, it might well be presumed the court proceeded upon the ground of the privilege of the witness; but considering the testimony, as I do, not relevant to the issue, it is of no importance further to consider the question of privilege, and whether it existed or not.

In regard to the count in the indictment, for incest, it strikes me that the fact, that the prosecutrix stated that she had been delivered of a child in consequence of the connection with the respondent, was of no possible importance. It seemed to have fallen out inadvertently. It was a fact not sought for by the prosecution, and not objected to by the defendant. The simple fact that the girl was delivered of a child, had no tendency to prove that such child was begotten by the defendant, and, much less, to prove that the sexual connection in which it was begotten was against her will. It is a fact in no way confirmatory or bearing upon the position that the daughter had an illicit connection with the father, which is the point to be established under the count for incest.

If, then, the fact of her *pregnancy*, and the birth of the child, were of no importance to the prosecution, and irrelevant and immaterial to the issue, the case called for no rebutting testimony in

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that particular, and it was not error for the court to exclude such testimony when offered. In cases of seduction, the birth of a child begotten by the defendant, is a material part of the plaintiff's case; and in prosecutions for bastardy, where the question is upon the *paternity* of the child, it is quite material in defense, to show that the mother had connection, about the time she swears the child was begotten, with other men. In prosecutions of that character, such a fact has always been allowed to be proved in our courts, and the inquiry, as to it, has been allowed to be made of the mother, who appears as a witness to sustain the prosecution. The inquiry, however, must be confined to about or near the time the child was begotten; otherwise it becomes immaterial. In the inquiry put to the prosecutrix, as to her connection with other men, before the child was begotten, there is no limitation as to time. The time subsequent, is only limited, by the inquiry, to some period before she discovered she was in a state of pregnancy. It might have been one, two or three days before, as well as at any other time. If this had been a prosecution to fix the paternity of an illegitimate child, the inquiries proposed to be made of the girl, were too unlimited, in range of time, to have rendered their rejection error. I think all the evidence, the object of which was to show particular instances of lewdness between the prosecutrix and other persons, was properly excluded, whether to be proved upon a cross-examination of the prosecutrix, or by witnesses called on the defense.

TIMOTHY HOWARD v. RODNEY D. GOULD.

Fraud.

A false representation, not believed to be true at the time, which a vendor of property makes for the purpose of inducing a purchase of it, or a false impression produced by his words or acts for the purpose of misleading and obtaining an undue advantage, whereby a purchaser is deceived and injured, is both fraudulent and actionable.

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The defendant, having information, and reason to believe that his horse had the glanders, was inquired of by the plaintiff respecting it, and replied that he supposed the horse had the horse-distemper, but that the plaintiff could examine him; and did not communicate the information he had received respecting the glanders; and the plaintiff was thereby induced to trade for the horse, and was damaged in consequence of his actually having the glanders; *it was held* that the defendant was liable to the plaintiff on account of a fraudulent suppression of material facts, which, if known, would probably have prevented the trade.

ACTION ON THE CASE for deceit in the exchange of a horse. The action was referred, and the referee reported as follows.

“The defendant, in the fall of 1850, purchased of one Parker Bryant, a gelding horse which was diseased, and the said Bryant, at the time the defendant purchased the horse, told him, upon his inquiring what ailed the horse, that some said he had got the horse-distemper, and some said it was the glanders, but that he, Bryant, did not know what ailed him.

“The defendant, very soon after purchasing the horse of Bryant, led him over to one Jonathan Atherton, an expert in the diseases of horses, to ascertain of him what ailed the horse; Atherton told him he thought the horse had the glanders, but did not know certainly. The defendant then told him that some said it was the horse-distemper, upon which Atherton told him, if the disease was the horse-distemper as they said, it would probably terminate in the glanders, and that he wanted he should take him away as he did not want him about the premises. Within one or two days after this, the defendant drove the horse to Proctorsville, and there met the plaintiff, when they commenced a conversation about trading horses. The defendant told the plaintiff his horse was sick and not fit to use, and that he wished to get one to work with, when the plaintiff asked him what was the matter with his horse? The defendant told him that he had got the horse-distemper of the worst kind he supposed, but the plaintiff might examine him; and the plaintiff thereupon went and looked at the horse and drove him a short distance. The plaintiff then told the defendant that he had heard the horse had the glanders, and asked if that was not what ailed him; the defendant replied that he supposed it was the horse-distemper; the plaintiff then remarked that he had had a good many horses that had the horse-distemper, and thought it might be that.

“After the plaintiff had driven the horse, Loren Howard, a son of the plaintiff, came up where the defendant and plaintiff were,

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and the plaintiff told the defendant he might trade with Loren. Loren Howard then inquired of the defendant what ailed the horse, and the defendant told him, he supposed the horse-distemper, that the horse was rode to Woodstock and back and turned out, and took cold. Loren Howard then asked if the horse had not got the glanders, the defendant replied he supposed it was the horse-distemper; that he, said Loren, could examine the horse. Loren then inquired of one Jerry Butterfield, who had considerable knowledge of horses, whether he thought the horse would get well, to which Butterfield replied he could not tell. After the above conversation, the defendant and Loren Howard concluded the trade, and the parties exchanged horses. The condition of the horse was such, that it was apparent to any one that he was much diseased, but it did not appear that the defendant had any other knowledge of what the disease was than what he had derived from Bryant and Atherton, in the manner aforesaid.

"The referee finds that the horse, at the time of the trade, was diseased with the glanders, and, intending to be guided by the rules of law, also finds that the defendant should have communicated to the plaintiff, under the circumstances of the trade, as above set forth, the information he had received from Atherton and Bryant respecting the disease of the horse, and that by concealing the same he was guilty of fraud; and that the plaintiff should therefore recover of the defendant twenty dollars damages and his costs.

"But if the court should be of the opinion that, by the principles of law, from the facts as above set forth, the defendant was not required, under the circumstances, to disclose the knowledge he had obtained from Bryant and Atherton, and that, after directing the plaintiff and Loren Howard to examine the horse, he was legally justified in permitting the plaintiff, under the impressions he would obtain from the appearance of the horse and the statements made to him by the defendant, to trade for the horse, then the referee finds for the defendant to recover his cost."

Upon the foregoing report, the county court, May Term, 1855,—UNDERWOOD, J., presiding,—rendered judgment for the defendant, to which the plaintiff excepted.

S. Fullam for the plaintiff.

J. F. Deane for the defendant.

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The opinion of the court was delivered by .

BENNETT, J. It is a common principle that a false affirmation, not believed to be true, or a fraudulent concealment of a material fact, accompanied with damage, is actionable. If the affirmation is untrue in point of fact, and not believed to be true by the party making it, and is made for a fraudulent purpose, it is both a moral and a legal fraud; *Taylor v. Ashton*, 11 M. & W. 415; and in *Polhill v. Watter*, 3 B. & Adolphus 114, the court go the length of holding that if one makes a representation which he does not know or believe to be true, and it turns out to be false, and another person, acting upon the faith of it, is injured, he has his remedy against the person making the false affirmation. A false affirmation, not believed to be true, is fraudulent; and the question of the liability of the person making it must depend upon the sincerity of his belief as to its truth, which will of course be for the jury to pass upon. In the case of *Munroe v. Pritchett*, 16 Alabama, 785, the court go the length of holding, that if the representations are made recklessly, the party not knowing them to be true, and for the purpose of inducing the other party to make a purchase, they are actionable if accompanied with damage. But we are not disposed, in this case, to lay the rule down in this language; but we think it safe to hold, that if the representations are false, and not believed to be true when made, and are made to induce a purchase, and a damage insues by means of them, they are fraudulent and actionable; and, to constitute a fraud, it is not necessary that a material fact should be directly misrepresented intentionally; but if a false impression is produced by words or acts, in order to mislead and obtain an undue advantage, it should be regarded as a case of manifest fraud.

When the defendant was inquired of if his horse had not got the glanders and he replied that he supposed the disease was the horse-distemper, this was, in effect, an affirmation that he did not believe the horse had the glanders, upon the principle that the affirmation of the one is the exclusion of the other.

From the facts found by the referee, and all the circumstances attending the case, I should have found no difficulty in inferring a belief in the mind of the defendant, that his horse had the glanders. But this was a question of fact. The referee does, however, find

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that, under the circumstances, the defendant was guilty of fraud by an improper suppression of facts. He bought the horse a very short time before the trade with the plaintiff for a diseased horse; and was told by the person of whom he bought, that some said he had the horse-distemper, and some said he had the glanders though he did not pretend to know himself. But Atherton, a man skilled in the diseases of horses, upon an examination of the horse, informed the defendant he believed the disease was the *glanders*.

When the defendant undertook to answer the inquiries put to him, he was bound to make a full disclosure. It is quite evident that this is a case, where, to say the least, there was a fraudulent suppression of material facts, which, if they had been disclosed, would probably have prevented the trade. Though the plaintiff knew the horse was diseased, and had the means of examining him, yet he had not the same means of knowing the character of the disease as the defendant had; and in this respect, they cannot be said to stand upon an equality. As this case went to a referee, no question can arise in regard to the plaintiff's right to recover, upon his present declaration, for a fraudulent suppression of facts.

The result must be, the judgment of the county court is reversed, and judgment on the report for the plaintiff.

SOLOMON DOWNER v. ROYAL FLINT AND LYMAN ELLSWORTH.

Costs. Pleading. Estoppel.

Separate travel and attendance fees before a justice, and travel and term fees in the county court, may be taxed by two or more defendants in an action of tort, unless by joining in a plea in bar they so identify their interests as to make the success of each dependent upon that of the other.

The general issue in actions of tort, though, in form, joint, is regarded as a several plea.

A disclaimer as to the ownership of property, the title of which was really in the plaintiff, which induced the defendant to sell it, when he would not have done so but for the disclaimer, *held* to estop the plaintiff from afterwards setting up his title and recovering of the defendant for the conversion of the property.

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TROVER for fifty sheep, originally commenced before a justice and brought into the county court by appeal. Plea, the general issue; trial by jury, May Term, 1855,—UNDERWOOD, J., presiding.

The plaintiff's testimony tended to prove that the sheep in question belonged to and were bailed by him to one Sylvanus Chamberlin, as whose property they were attached, by the defendant Ellsworth, upon a writ in favor of the defendant Flint, and placed in Flint's possession, from whom the plaintiff demanded them, and that Flint refused to let the plaintiff have them unless he would buy and pay for them; and that after Flint had refused to let him have them, he bought them of said Flint, and paid him \$1.25 per head, protesting, nevertheless, that he was the owner of them, and that he should call on him in some other way. The plaintiff's evidence further tended to prove that the sheep were large, nice sheep, with heavy fleeces, and were worth, at the time they were attached, from \$2.25 to \$2.50 per head, and had been sheared by Flint, after the attachment, and before the purchase by the plaintiff.

The defendants gave evidence tending to prove that the sheep were the property of Chamberlin; and that, after the attachment, Chamberlin and Flint had them appraised, and applied in payment of said Chamberlin's debt to Flint; and that Chamberlin informed Flint that he did not know but the plaintiff would claim the sheep. The defendant's evidence further tended to show that, after the attachment, Flint sent Ellsworth to see the plaintiff, and ascertain whether he owned the sheep; and that, the plaintiff, on that occasion, told Ellsworth he had sold a colt to Chamberlin, with which he had procured the sheep in question, and disclaimed having any sheep there.

The defendant's evidence tended further to prove that, at the time the plaintiff purchased said sheep of Flint, Flint inquired of the plaintiff whether he owned the sheep, and told him that he wanted no litigation about them, and that, if the plaintiff owned them, he would deliver them up to him; and that, on that occasion, the plaintiff told Flint that he was not the owner of the sheep, and had no claim to or interest in them, and that the plaintiff then purchased the sheep, as above stated.

The plaintiff requested the court to charge the jury that though they should find that he disclaimed all ownership or interest in the

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sheep, on that occasion, and declared to Flint that he had no interest in them, yet, if they should find that the sheep in fact belonged to the plaintiff, and that the title to them was in him, that he might recover for the sheep; that, in any event, if the sheep belonged to the plaintiff, and the title was in him, that he would be entitled to recover the value of the fleeces on the sheep when taken, and which had been shorn from them; being the difference in value in said sheep between the time they were attached and the time they were purchased by the plaintiff.

The court refused to charge the jury as requested, but did charge them, among other things not excepted to, that if they found, from the proof in the case, that the plaintiff, after learning that Flint had attached them as Chamberlin's and had had them applied on his debt, as the testimony tended to show, and when Flint offered to return them to the plaintiff, if he claimed to own them, that if then the plaintiff disclaimed all ownership or interest in them, and gave Flint fully to understand that he had no interest in or ownership of them, and purchased them of Flint, as the testimony tended to show, then, though they should find that the title, in fact, was in the plaintiff, yet that he would be estopped from setting up his claim, and would not be entitled to recover either for the sheep or for the fleeces. Verdict for the defendants.

To the refusal of the court to charge as requested, and to the charge, as given, the plaintiff excepted.

In the taxation of the defendants' costs, the plaintiff objected to the allowance of two travels and two attendances for the defendants before the justice, at the different trials. It was conceded that the defendant Flint did not personally attend at any of those trials. His fees for travel and attendance were allowed by the court at \$7.94, to which the plaintiff excepted. The plaintiff also objected to allowing the defendants separate term fees and separate travels at each term of the county court, but the court overruled the objection, and allowed separate term fees and separate travels, each term; to which the plaintiff also excepted. The defendant put in a written plea before the justice, but no pleadings were filed in the county court, the plea, at the commencement of the trial, being stated to be the general issue.

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W. C. French and Washburn & Marsh for the plaintiff.

A. P. Hunton for the defendants.

The opinion of the court was delivered by

REDFIELD, CH. J. I. The decision in regard to costs seems to us correct. Each defendant, in actions of tort, has been treated as a distinct party in the suit, until by joining in a plea in bar, with others, or in some other way, he so identified his interests with others, that the success of the defense, as to each one, depended upon its success, as to all. This will entitle them to tax separate travel and attendance, before the justice, and separate travel and term fees, in the county court. The attorney fee is given, on account of the trial, and no more attorney fees are taxable upon the same side than there are distinct trials in the action. The general issue, in actions of tort, is regarded as several, although in form joint. In the present case the plea before the justice was, in form, several, and, not being renewed before the county court, might still be regarded as in force, the same as a declaration. But the result is the same either way.

II. In regard to the merits of the case, we must, for the purpose of testing the correctness of the decision below, assume that the plaintiff was the owner of the sheep, at the time they were taken, as there was testimony tending to prove this. We must, also, lay out of the case what the plaintiff said to Ellsworth, as the case was made to turn upon the transaction with Flint.

It seems to us the extent and force of the transaction is to depend upon the legal understanding of what passed. Did, then, the parties understand that the plaintiff there made any abandonment of his claim, upon which the defendant was induced to change his course of action? and, if so, to what extent was the claim abandoned? Did it extend to the whole claim, or only to the sheep, and not the wool?

1. It seems to us difficult to so construe the case that it shall fairly appear, upon the defendant's testimony upon this point, (which is now all that is under consideration,) that he did not change his course of action, upon the plaintiff's assertion that he was not the owner of the sheep, and had no claim to, or interest in

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them. For the defendant seems to have made that an express condition of the sale of the sheep to the plaintiff. Flint said he wanted no litigation about them, and, if the plaintiff owned them, he would deliver them up to him; and, the case adds, that after these mutual declarations, "that the plaintiff *then* purchased the sheep." That must signify something more than that he purchased the sheep, at that time, immediately after this conversation. It can signify nothing less, in the connection, than that the defendant would not sell until the question of the plaintiff's claim was quieted and settled, or abandoned, and that the sale was finally closed upon this express understanding. This being so, the claim, however valid it may have been, was abandoned understandingly, and upon sufficient consideration; the defendant having been induced to act upon the assurances, and it cannot now be revoked. The plaintiff is forever barred from asserting the claim which he then abandoned.

2. But a question is made whether the entire claim was really understood to be abandoned. But it seems to us the parties must have understood the abandonment as extending to the entire claim for the sheep, as taken, with the wool upon them. The defendant said he wanted no litigation about them, that is, the sheep, as taken, of course. For it would be absurd to suppose that he meant only the sheep, and not the wool. That would leave the entire litigation, as much as if the sheep were not settled for. The declaration, too, that if the plaintiff owned them he would deliver them up to him, must, to be reasonable, include both the sheep and the wool, for nothing less would quiet litigation. The plaintiff's declaration, too, on this occasion, that "he was not the owner of the sheep, and had no claim to, or interest in them," could signify nothing less than an abandonment of all claim to the sheep, when taken, and, as taken. And this was the condition upon which the sale was effected. And, if binding at all, it is binding to the full extent.

For if the defendant was not entitled, as of right, to return the sheep and wool, there can be little question, on the defendant's proof, it would have been then accepted, if offered. At all events, the party was entitled to make the attempt to buy his peace, and by reason of this abandonment of all claim, it is fair to presume, the defendant has been induced to sell the sheep to the plaintiff, and

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to forego all efforts to compromise the matter in any other way, and has incurred the expense and hazard of defending this suit. This, it seems to us, renders the estoppel sufficiently binding to the fullest extent.

If we limit the binding force of the estoppel to the loss incurred in faith of it, it will cover the plaintiff's whole claim. For nothing less will place the defendant in the same situation he would have been, if the assurance had not been given by the plaintiff and acted upon by the defendant.

Judgment affirmed.

JOHN L. BOWMAN v. SOLOMON DOWNER.

Award. Costs of arbitration. Evidence. Statute of limitations.

A general award is sufficient, where the claims submitted are pecuniary, or capable of being reduced to a definite sum, and the submission does not require or contemplate that the arbitrators should award the performance of any other act than the payment of money.

In this case the submission required the arbitrators to decide as to the sufficiency of a tender made, and the right of a party to recover in a suit commenced by him, (to the recovering party in which the taxable costs were to be awarded,) and also to determine the liability of the other to account for certain rents, and their value. The arbitrators awarded generally, that one of the parties should pay a specified sum to the other, on demand, "in full of and for all matters submitted." The award held sufficient.

In this state the costs of the prevailing party in an arbitration may be awarded in his favor, though there be no provision for it in the submission.

The plaintiff claimed to recover the amount of certain taxes, which he claimed had been assessed against the defendant and placed for collection in the hands of the plaintiff, as constable, and by him paid to the treasurer of the town, to which he was accountable, and that the defendant had promised to pay him. Held, that the tax-bills in the hands of the plaintiff were admissible, and *prima facie* evidence of the existence of the taxes, and the amount for which the defendant was liable upon them.

Held, also, that the fact that the plaintiff had given bonds, as constable, and received the tax-bills in question, and had settled with the town and taken up his bonds, afforded *prima facie* evidence that he had paid the taxes assessed against the defendant.

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A request from the defendant to the plaintiff so to pay, may be inferred from an assurance given by the defendant, upon receiving a note from the plaintiff, that it could be arranged by the taxes the defendant was owing him, and that within the year for which the note was given they would get together and have it settled. The defendant had subsequently transferred the note, and the plaintiff had been obliged to pay it to the endorsee.

Such an assurance, if within six years, would be sufficient to prevent the operation of the statute of limitations.

ASSUMPSIT, upon a submission and award; and upon the general counts. Plea, the general issue, and the statute of limitations; trial by jury, May Term, 1855,—UNDERWOOD, J., presiding.

The plaintiff offered in evidence a submission, signed by the plaintiff and the defendant, which was as follows, viz.

“SOLOMON DOWNER v. JOHN L. BOWMAN and PHILANDER C. BROWN. *Windsor County Court*, March Term, 1846. Action of ejectment. We hereby agree to submit the matters in controversy, in the above entitled suit, to” * * * * *

* * * (naming the arbitrators, time and place of hearing, &c.)

* * * * * “Said persons shall decide and determine the sufficiency of the tender made by said Downer, and his right of recovery in the above named suit, and the taxable costs shall follow the same, and be recovered by the prevailing party; and they shall also determine the value of the rent or use of the premises in controversy, per year, from the time said Bowman became liable to account for or pay said Downer for the same, if they shall so find; and said Bowman shall give said Downer possession of said premises on the first day of April, 1846, or at any time thereafter when said Downer shall request such possession. And, after considering the amount and sufficiency of said tender, and the rent and use of said premises, and which of said parties are liable for the payment of the taxable costs in said suit, said persons shall determine what balance is due from one to the other of said parties, which balance each of said parties hereby agrees and promises to pay to the other party, according to the determination of said persons before named, so made as aforesaid,” together with an award, signed by the persons named in the submission as arbitrators, of which the following is a copy:

“We, the undersigned arbitrators, mutually chosen by Solomon Downer and John L. Bowman to hear and determine certain mat-

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ters and differences between them, named and submitted in a certain written submission by them executed, after meeting and hearing the parties, on the 4th day of June, 1846, and considering their respective proofs, we do decide, determine and award, that the said S. Downer shall pay, on demand, to the said J. L. Bowman, the sum of \$115.26, in full of and for all matters submitted, and costs of said Bowman in and about this arbitration."

"*Royalton*, Jan. 4th, 1846."

To the admission of each of these papers the defendant objected, but the same were admitted by the court, to which the defendant excepted.

The plaintiff testified, in substance, that he was constable and collector of taxes for the town of Royalton, from 1834 to March, 1846, except for one year; that in December, 1843, April, 1844, January, 1845, and January, 1846, he received, from the selectmen of Royalton, tax-bills, on which sundry town, state and school taxes were assessed against sundry persons, and among others that there were taxes, on each of said bills, against the defendant; that he thought he had called upon the defendant for said taxes, but had no recollection as to the time when he called upon him, but that it was previous to April, 1848; that the latter part of April, 1848, the plaintiff and defendant met at Bethel for the purpose taking testimony in a chancery suit then pending, in which the defendant and the estate of one Bosworth, then deceased, of which the plaintiff was administrator, were parties; and that there was also a suit at law then pending, in which the defendant and the said Bosworth's estate were either parties or interested; that the defendant proposed terms of settlement, according to which there would be a balance due to the defendant; and the plaintiff further testified, "I asked the defendant how it could be arranged; he said that it could be arranged well enough, I am owing you taxes and that award; it will come right enough between you and me; I will take your note payable in a year, and during the time we will get together and have it settled;" and that the plaintiff did thereupon settle and give his note to the defendant for the amount agreed upon, payable in one year thereafter. It appeared that this note was sued in the fall of 1852, in Orange county, in the name of Daniel Cobb, as plaintiff, and judgment obtained; and that the

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plaintiff paid the amount of said judgment, previous to the commencement of this suit.

The plaintiff offered in evidence said tax-bills, to each of which was attached the certificate of the selectmen, and, to two of them, warrants duly signed by a justice of the peace, but to the other two bills no warrants were attached, and no other evidence was offered by the plaintiff as to the legality of the taxes on said bills; to the admission of said tax-bills the defendant objected, but the same were admitted by the court.

The plaintiff further testified that it was his custom to pay over money to the town treasurer as fast as collected, but that he had no recollection of making any advanced payments, and that he had settled and taken up his bonds to the town, as constable; but at what time he made such settlement he was unable to state, but thought it might have been about six years previous to this trial.

The defendant requested the court to instruct the jury that there could be no recovery, in this action, for the amount of said taxes, or any part thereof, because there was no request by the defendant to the plaintiff to pay said taxes;—that he could not, in any event, recover, without proving a special promise to the plaintiff personally; and that there was no sufficient proof that any legal taxes existed against the defendant.

The court declined to charge the jury as requested, but did charge them, among other things not excepted to, that if they were satisfied, from the evidence, that these taxes existed against the defendant, and had been duly assessed, and they believed that the transaction and conversation at Bethel was as testified to by the plaintiff, and that the plaintiff had settled with the treasurer for his tax-bills, and that the note the plaintiff gave was sued, and paid by the plaintiff, the plaintiff was entitled to recover for the taxes; and that the same evidence which would constitute the plaintiff's right to recover for the taxes, would remove the statute bar as to the taxes; and as to the award, if the jury were satisfied that the defendant, at Bethel, recognized his liability for the award, and made the declaration, as to the award and taxes, as the plaintiff testified; and that, to induce the plaintiff to settle the suits and give his note, it would be a sufficient answer to the statute of limitations.

To the charge of the court, and the refusal to charge as re-

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quested, the defendant excepted. The jury returned a verdict for the plaintiff.

W. C. French and Washburn & Marsh for the defendant.

An award must strictly follow the submission, and the arbitrators must award upon all the matters submitted to them; 1 Swift's Dig. 468; 2 Pars. on Con. p. 291. In this case the parties submit, 1st, the sufficiency of the tender made by the defendant in the suit then pending; 2d, the defendant's right to recover in that suit; 3d, the taxable costs in that suit, to be awarded to the prevailing party; 4th, the value of the rents, per year; 5th, lastly, after considering all these matters, they were to find the balance due from the one to the other. In the award, the arbitrators merely find a balance due from the defendant to the plaintiff, without taking any notice and awarding upon any of the other matters submitted. By no reasonable intendment can it be presumed that the arbitrators took those matters into consideration. They are entirely distinct from the finding of a general balance. The following cases fully sustain our views, some of which are very analogous to the present case. *Madkins v. Horner*, 8 Ad. & El. 246; *Rider et al. v. Fisher*, 8 Bing. N. C. 874; *Upperton v. Fisher*, 1 Har. & W. 280; same case, 3 Ad. & El. 295; *Houston v. Pollard*, 9 Met. 164; also Stephen's N. P. 1 vol. p. 81.

The arbitrators had no power to award the costs of arbitration to the plaintiff. No such permission was given them by the submission. The *dictum* of Judge WILLIAMS in *Hawley v. Hodges*, 7 Vt. 237, is not sustained by the authorities. The distinction is between a *submission by the parties*, and a *reference under rule of court*. In the latter case, the referees have power to award costs, but in the former, the arbitrators have not. 1 Stephen's N. P. 148, and cases cited; *Peters v. Pierce*, 8 Mass. 398; *Nelson v. Andrews*, 2 Mass. 164; *Bacon v. Cramton*, 15 Pick. 79; *Gordon v. Tucker*, 6 Greenl. 247; *Vose v. Howe*, 13 Met. 243.

As to the taxes, the most that can be made out of the transaction at Bethel, upon which the court based the right of the plaintiff to recover, is that the defendant then admitted that the plaintiff had unpaid taxes against him. He did not promise to pay the taxes to the plaintiff, nor did he request the plaintiff to pay the taxes for

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him. There was no evidence that the plaintiff had ever paid the defendant's taxes to the town treasurer. The plaintiff testified that he had settled and taken up his bonds, as constable; but he further stated that he had no recollection of making any advance payments to the town. The town might have retained these taxes, or abated them.

The tax-bills should not have been received in evidence. 1st, because there was no evidence tending to show that any of the taxes were ever legally assessed; 2d, because, as to two of the tax-bills, there were no warrants attached, and no authority whatever to justify the plaintiff in collecting them.

A. P. Hutton and Converse & Barrett for the plaintiff.

As to the sufficiency of the award, see *Hawkins v. Coldough*, 1 Burr 274; *Houston v. Pollard*, 9 Met. 164.

As to authority to award costs of the arbitration, see *Roe d. Wood v. Doe*, 2 T. R. 644; *Wood v. O'Kelly*, 9 East 436; *Alling v. Munson*, 2 Conn. 691; *Chase v. Strain*, 15 N. H. 535; *Strang v. Ferguson*, 14 John. 161; *Hawley v. Hodges*, 7 Vt. 237.

The tax-bills were properly received in connection with the other testimony. They established the fact that rate-bills were in the collector's hands, and the amount in which the defendant was therein assessed. They tended to show that the selectmen of Royalton claimed so much of the defendant, by way of taxes. The defendant could as well authorize the plaintiff to pay the same, on his account, without, as well as with a warrant. Had the defendant requested some third person to pay the amount of these bills to the plaintiff, and he have done so, could he have excused himself for not re-imbursing such person, by showing that the plaintiff, at the time, had no warrant? Nor was it necessary to show any further evidence of their legality. If the plaintiff was authorized by the defendant to pay, and did pay those bills, the defendant cannot now resist the claim on the ground that they were not legal.

The opinion of the court was delivered by

ISHAM, J. This is an action of assumpsit on an award of arbitrators, and for money paid. In relation to the award, it appears that the arbitrators have allowed the sum of \$115.26, as a balance

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due from Downer to the plaintiff. It is insisted that the award is void, as the arbitrators did not follow the submission, or finally determine the matters submitted to them. The award, on its face, purports to have been made by the arbitrators, after hearing the parties and considering the proofs, upon all the matters submitted to them. In the case of *Houston v. Pollard*, 9 Met. 169, CH. J. SHAW observed that, "when the claims on both sides are pecuniary, "or for damages capable of being reduced to a certain sum, if the "arbitrators, professing to decide on the whole subject, find a balance due from one to the other, such an award is conclusive, although the *particulars from which that balance resulted* are not "stated." We are unable to perceive any matters in this case which do not fall within the application of this rule. From the submission, it appears, that the matter referred was a suit in favor of Solomon Downer against the defendant and others, in which was involved a controversy as to the validity of a tender made by Downer, and his right of recovery. That controversy, the arbitrators were to determine. They were also to ascertain the value of the rents or use of the premises, and the taxable costs of that suit, which were to be awarded to the prevailing party. From those matters, the arbitrators were to determine the balance due. There is nothing in all these matters but what are *pecuniary claims*, and capable of being reduced to a definite sum. The arbitrators were not authorized to impose upon the parties the performance of any specific act, aside from the payment of the balance in money, as that balance should be found. If, besides ascertaining a certain sum to be paid in money, the arbitrators were required to direct the specific performance of certain acts on an unperformed contract, greater certainty would be required; a general award would be too indefinite. It is possible, also, that that result would follow if they were not required, but simply had the power to make such an award. That was the principle on which the cases were decided, to which we were referred by the counsel for the defense. *Rider v. Fisher*, 3 Bing. N. C. 874; *Madkins v. Horner*, 8 Adol. & EL. 246; *Houston v. Pollard*, 9 Met. 164. The case under consideration is not one of that character. The arbitrators were not authorized, by the submission, to impose on either of these parties the performance of any specific act or duty, but the payment of the

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money, as that balance should be found due. In all such cases, the award may be general. The arbitrators need not specify the particular matters determined, and from which the sum awarded was found. In 1 Steph. N. P. 80, as it is said, that all fair presumptions are to be made in favor of an award; and if, on any fair presumption, the award may be brought within the submission, it shall be sustained. We have no doubt that the award in this case will be a good defense in any subsequent litigation that may arise out of the matters embraced in that submission. In relation to the costs of the arbitration, which are included in the sum awarded, we think the question must be treated as having been settled in this state, in the case of *Hawley v. Hodges*, 7 Vt. 237. The rule may perhaps be otherwise settled in England, and in some of the states in this country; *Vose v. Howe*, 13 Met. 244. But in the case of *Hawley v. Hodges*, CH. J. WILLIAMS observed that, "there is no question that it is incident to the authority given to an arbitrator, in a general submission, where no mention is made of costs, to award concerning the costs of arbitration." That rule having been early adopted in this state, and the general practice being in conformity with it, we must consider the rule as settled. We think, therefore, that the plaintiff is entitled to recover in this case the amount of that award.

On the general counts, the plaintiff seeks to recover the amount paid by him to the town of Royalton, in satisfaction of taxes which were assessed in that town against the defendant. To sustain that claim it must appear that such taxes were in existence, that they have been paid by the plaintiff, and upon the request of the defendant. On this subject, it may be observed that, if the testimony introduced in proof of these matters was competent, the jury, under the charge of the court, have found those facts to exist in the case. In relation to the existence of those taxes, and the amount for which the defendant was assessed, we have no doubt as to the competency of the testimony introduced for that purpose, and that it had a legal tendency to prove their existence, and the amount for which the defendant was liable. If the question arose on a plea justifying the levy of the warrants on property, for the collection and payment of those taxes, the plaintiff would probably be held to more strict proof of the assessment. But if the defendant, knowing that these

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tax-bills were in the plaintiff's hands, agreed to settle them, or apply the amount on any claim he had against him, and those taxes were assessed and certified by the selectmen, we think that in this action they will afford *prima facie* evidence that such taxes existed, and of the amount due on them. The defendant possibly would not be concluded, by such an agreement, from having corrected any mistake that may have been made in making that assessment, but as the defendant offered no evidence of that character, the tax-bills were properly received in evidence. We are satisfied, also, that there was evidence tending to prove that the amount of those taxes had been paid by the plaintiff to the town of Royalton. If testimony *tending to prove that fact* was submitted to the jury, their verdict, finding that the payment was made, is conclusive in the case. The facts proved in the case, that the defendant, as constable, had those tax-bills in his hands, that his liability for them to the town was secured by his bond, as constable, and that he had settled with the town and taken up his bond, was competent evidence to be taken into consideration by the jury, and does afford *prima facie* evidence that the taxes assessed against the defendant were paid by the plaintiff to the town. It is true the taxes may have been abated, or the plaintiff may have been in other ways relieved from the payment of them. But that is not the legal presumption. If the fact so existed, it is a matter of defense, and for the defendant to establish by proof. On the question whether the *defendant requested* the plaintiff to pay the taxes for him, it is to be observed that the jury, under the charge of the court, have found that the arrangement was made between these parties in April, 1848, as was testified to by the plaintiff. In that arrangement, it seems that the plaintiff was indebted to the defendant on claims arising out of the estate of one Bosworth, and that he gave the defendant his note, payable in one year, for the amount due him, under a promise and assurance given by the defendant that, in the mean time, the taxes as well as the award and note, should be settled. It is necessarily implied, in this arrangement, that the plaintiff was to settle those taxes with the town, and that the amount he paid on those taxes, and the amount of the award, should be paid to the plaintiff by applying them on that note. That application of those claims has been prevented by the de-

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fendant's transfer of that note, and thereby compelling the plaintiff to pay the full amount due upon it, to an endorsee. Under those circumstances, we think the plaintiff is entitled to recover the amount he has paid on those taxes to the town of Royalton. The court also properly instructed the jury that that arrangement was competent evidence of a direct recognition of his liability on that award, and will avoid any question arising under the statute of limitations. The defendant having induced the plaintiff to give him his note on the Bosworth claims, under his promise that the award and the taxes should be settled and applied on the note, there is no propriety in his now being permitted to deny his liability on those matters. We think, therefore, that the judgment of the county court must be affirmed.

GARDNER J. HOWE v. JOHN Q. ADAMS.*Homestead. Effect of a conveyance of it by the husband alone.*

The owner of a homestead, having a wife, may convey it by his own deed, without his wife's joining in it, so as to vest in the grantee a superior title to that of a subsequently attaching and levying creditor upon a demand which accrued before the first of December, 1850, and as to whose claim the homestead was not exempted from attachment.

EJECTMENT to recover the possession of certain lands in Andover. Plea, the general issue; trial by jury, May Term, 1855,—UNDERWOOD, J., presiding.

The premises in question were owned by John Adams, who was indebted to the plaintiff upon a promissory note given previous to the 1st of December, 1850. They constituted his homestead, and consisted of the house which he and his wife occupied in February, 1851, and of the land adjoining. John Adams conveyed certain land, including the premises in question, to Warren Adams, on the 10th of February, 1851, by a deed executed by himself alone, and in which his wife did not join. On the 12th of the same Febru-

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ary the plaintiff attached the premises upon a writ issued upon the above mentioned note, upon which he subsequently obtained a judgment, and took out an execution, upon which he procured the said John Adams' homestead to be set out, and then levied the execution upon a portion of the homestead premises, which was set off by metes and bounds. This levy was made October 14th, 1851; and on the 15th of the following December, the same premises deeded by John Adams alone, on the 10th of February before, were conveyed to Warren Adams by the joint deed of the said John Adams and his wife, and the said Warren Adams afterwards on the 14th of April, 1853, conveyed the premises to the defendant, who entered and was in possession of them at the commencement of the plaintiff's suit.

Upon the evidence showing the above state of facts, the county court, *pro forma*, instructed the jury that the premises were subject to the plaintiff's attachment, and that by it, and the subsequent levy, the plaintiff obtained a valid title to them, and was entitled to recover. Exceptions by the defendant.

S. Fullam and *H. E. Stoughton* for the defendant.

R. Washburn and *Washburn & Marsh* for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. It is obvious from the general object and purpose of the homestead law, as well as from its specific provisions, that it was not intended to affect the essential rights of two classes of creditors; 1st. Those prior to the act coming in force; 2d. Those prior to the purchase of the particular homestead in question.

Hence the act contains no provision, applicable to those creditors whose rights are superior to the homestead interest. That class of creditors, it is supposed, will levy upon the land without regard to this interest the same as before the act was passed. But those who desire to levy upon the real estate of the debtor, subject to the homestead, are provided with a process for ascertaining that interest in such portion of the premises as the debtor shall elect. And no provision is made for setting out the homestead, in any other case, or unless the debtor shall elect to have it set out.

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It must be obvious then, that the plaintiff's case is strictly *casus omissus*, and unless we accommodate the provisions of the act, so as to meet a case of this kind, it is apparent the creditors in plaintiffs place, either cannot levy at all upon such interest, or else they must levy upon an undivided portion of the whole interest, in common. Courts often do accommodate the provisions of a statute to cases which they were obviously intended to cover, although not well suited to accomplish. But we should always hesitate to do this in cases altogether one side of the general purpose of the statute.

And here it seems to us the plaintiff's case is of this character, It cannot fail to strike all minds alike, that it never could have been the purpose, or among the purposes of this homestead law, to prevent the operation of the debtors conveyance upon the homestead interest, so that it could remain to enable prior creditors to levy upon it. If that had been designed or contemplated as a possible contingency, there would doubtless have been some provision applicable to such a case. It was no doubt intended that the debtor's conveyance should operate, as to prior creditors, the same it did before, that is, pass the estate. But they have not, in terms, so provided. But we are inclined to think that, as to creditors whose rights are superior to the homestead interest, the act should be so construed, and the limitation upon the conveyance only extended to those persons whose interests are liable to be affected by the exception in the statute, that is the wife and family, and creditors, whose interests are subordinate to the homestead interest.

At all events, if a residuum could be carried out by this kind of refinement, for the benefit of one never intended to have any such advantage, we do not feel that it is the duty of courts to invent a process by which such creditors may accomplish what the statute so obviously, never designed.

The creditors in such cases, if they could levy at all, must either levy upon an undivided interest in the homestead, or induce the legislature to make some provision, by which the homestead interest may be levied upon. We are so well satisfied that it was not the purpose of the legislature to create such an interest by the act, as could be levied upon separately, in a case like the present, that we could not feel justified in accomodating the present provisions of the act, to any such purpose.

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The homestead law does not vest any title in the wife of the householder, as to the homestead. It is at most but a negative which she has upon the conveyance. The consent by deed is indispensable to the full effect of the conveyance. This must be by deed jointly with her husband. When that is obtained the conveyance becomes effectual from the first. It is much like a right of dower at common law, which the wife could only bar by joining in the conveyance in a prescribed form. But she had no existing title, and the conveyance of the husband was good as to every thing but the contingent right of the wife. And this right of dower she could not convey to any one but the grantee, unless she survived her husband, or until after his death. And if, subsequent to the deed of the husband, she joined in barring her dower, the deed of the husband thus become effectual, as from the beginning.

Now this homestead interest being an incumbrance upon the title for the purpose of effecting a particular object, the support and maintenance of the family in its home, whenever the purpose of the statute is effected in any other mode, as by the husband procuring another homestead, this incumbrance, or obstruction to the full operation of the former conveyance, ceases without any release of the wife. This shows very clearly that no other person ought to be allowed to assert this right of the wife, either in her behalf, or, as in the present case, for their own purposes. I take it to be too obvious to require argument, that one family cannot have more than one homestead at the same time. And that when a new homestead is obtained, the former one ceases. It is then a sort of lien, or mortgage upon the estate of the husband in favor of his wife, and nothing more; and when another one is obtained, it operates as an extinguishment or release. Now it is well settled that an interest of this kind in land is not the subject of a levy, even in favor of the creditors of the mortgagor, or person in whose power the lien exists, much less of any other one. The reason is that it is not a fixed, definite estate in the land, capable of appraisal and separation to the creditor in the execution; but is constantly liable to variation, and to be defeated altogether by matters not of record, or by deed, but resting altogether in oral evidence.

So in the present case, all the grantor had to do to render his deed of the 10th of February effectual, was to procure another

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homestead. It then becomes effectual in spite of every one. But suppose he does this while the levy is progressing, or the day after the levy, is not the lien removed as effectually as if it were done the day before? It seems to me absurd to treat this mere lien of the wife as a definite estate which may be attached, or levied upon by the husband's creditors. It has been compared to her right of dower, at common law, but it is really inferior to that in one sense, inasmuch as it is not in the power of the husband to extinguish that right, while he may extinguish this at any moment, if he choose. And like the right of dower, at common law, this also becomes a fixed estate in the wife and family after the decease of the husband.

There is, too, one contingency in regard to the homestead interest, where it exists in gross after it is set out by a creditor levying upon the other portion of the estate. For if, after this, the husband do obtain another homestead, any of his creditors may doubtless levy upon his former homestead, not as a homestead, but as land belonging to the husband, by setting out another homestead, if the land is still connected.

The statute in regard to the homestead, requires that it should be occupied as such, or seems to require that, in order to its creation or, possibly, even continuance. And if so, it is not very obvious how this provision of the statute can be dispensed with. It seems very obviously not to have been the purpose of the legislature to give even a married man a homestead interest for the benefit of his wife and family, as against his creditors, unless he were a householder, and occupied it as a homestead, in the first instance. For the terms of the act are very specific, "occupied by such person as a homestead, and the yearly products thereof shall be exempt from attachment and execution." And how the interest can be continued without occupation some have questioned. If the debtor choose to board, or to reside in a hired house, or for any other reason, does not choose to occupy the homestead, and permanently breaks up his occupancy, it is supposed by some that the interest ceases. But I do not profess myself prepared to adopt this latter view at present; of the former views we entertain no doubt,

Judgment reversed and case remanded.

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JOHN BRALEY v. WILLIAM S. FRENCH AND CELIM FRENCH.

Attachment of real estate. Evidence.

An attachment of real estate is effected by the officer's leaving in the town clerk's office, a copy of the writ, with his return of such an attachment thereon. The making of the record or entries respecting it, which it is the duty of the town clerk to make, does not constitute any part of the attachment itself.

By such an attachment, the officer acquires no special property in the real estate, and has thereafter no control over the lien thereby created. This lien can only be released or discharged by the creditor himself.

It will be presumed, until the contrary is shown, that an attachment of real estate was made under the direction and with the assent of the creditor; and declarations of the officer, made after the attachment, are not admissible for the purpose of showing that the attachment was not so made.

EJECTMENT for a piece of land in Barnard. Plea, the general issue; trial by jury, May Term, 1855,—UNDERWOOD, J., presiding.

The plaintiff's evidence tended to show an attachment of the premises in question, as the property of Hiram Aikins, on the 12th of August, 1850, upon a writ in favor of the plaintiffs against the Aikins and others; a judgment recovered on said writ; the issuing of an execution and levying it upon the premises, before the expiration of the attachment lien. To defeat the title thus claimed, the defendants offered testimony tending to prove that, at the time said attachment was made, August 12, 1850, several other creditors of Hiram Aikins, made attachments of the same real estate, by causing copies to be left at the town clerk's office of Barnard, and that Gilman Henry was the officer who made the plaintiff's attachment, and several of the others; that afterwards, and before the session of the court, to which the plaintiffs writ was returnable, a negotiation was entered into between said Hiram and his attaching creditors, with the exception of the plaintiff, for the withdrawal of their attachments, and for the sale of the premises to the defendant, William S. French; and that he declined to purchase until all said attachments could be removed, and that this was made known to said Henry; that the other creditors withdrew from the office of the town clerk the copies which had been left in their suits, so as to enable French to make the purchase free and clear of their attachments, the town clerk having made no record or minutes of any of the attachments according to the statute; and

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that said Henry, without the knowledge or consent of the plaintiff or his attorney, erased from the return on the copy of the plaintiff's writ which he had left in the town clerk's office, that part of the return that related to the attachment of real estate and substituted a return of attachment of certain personal property; and that he also withdrew said copy altogether from the town clerk's office; and that he told said Hiram Aikins, on that occasion, he had not been directed by the plaintiff to attach real estate; and that directly after all this, the defendant, William S. French, made the purchase, took his deed, and put it on record.

The defendant called the town clerk of Barnard as a witness, who produced his book of records of attachments which showed an attachment of said real estate, on the plaintiff's writ, as having been made August 12, 1850; and also produced a copy of said writ, and said Henry's return of such attachment thereon, and a minute on the back thereof, of its having been received for record, August 12, 1850, and proposed to show by said town clerk, that said copy was, in point of fact, delivered to said town clerk, by said Henry, and said record made as late as the winter of 1850-'51, after the record of the defendant's deed; and that the town clerk made the minute on the back thereof, at that time, ante-dating it to the 12th day of August, 1850, by the request of said Henry, and made his record from that copy. To the admission of all said testimony the plaintiff objected, but the court admitted it, to which the plaintiff excepted. The court charged the jury that if said Henry, under the circumstances which the testimony tended to show, after having left a copy of the plaintiff's writ, and before any record or minutes thereof were made by the town clerk, withdrew the copy left on the 12th day of August, 1850, or erased therefrom the return of the attachment of real estate, to enable the defendant to take a deed of the premises unincumbered, from Hiram Aikins, and said defendant took his said deed and put the same on record before a subsequent copy of the plaintiff's attachment was left and recorded, as of August 12, 1850, then the defendant was entitled to a verdict, even though the plaintiff had no knowledge of such withdrawal or erasure by said Henry. To this charge the plaintiff also excepted. The jury returned a verdict for the defendant.

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Washburn & Marsh for the plaintiff.

The act of the sheriff in changing the security from an attachment of real estate to an attachment of personal property, without the knowledge or assent of the plaintiff, was inoperative and void. The mode of effecting service is prescribed by statute, and when once made, the authority of the sheriff is terminated. He is not made by law the agent of the creditor. *Wainwright v. Webster*, 11 Vt. 576. *Almy et al. v. Walcott*, 13 Mass. 76. The original return of the attachment of real estate, is conclusive of the fact of attachment; and parties and privies are estopped from impeaching it. The defendant had notice in fact of the attachment, and assented to the act of the sheriff, knowing that the security of the plaintiff might be thereby impaired, and that the sheriff was acting without the knowledge or consent of the plaintiff. He cannot complain that he is defrauded, and, in the absence of fraud, the return is conclusive. *Lathrop v. Blake*, 3 Fost. 57. *Brown v. Davis*, 9 N. H. 76. *Slayton v. Chester*, 4 Mass. 479. *Estabrook v. Hapgood*, 10 Mass. 314. *Butt v. Burnell*, 11 Mass. 165.

The sheriff being estopped to impeach his own return, certainly hearsay evidence of his declarations is inadmissible for that purpose.

The return upon the original writ showed the attachment perfected. The record in the town clerk's office showed the same. The plaintiff had used due diligence; so far as he or his attorneys were informed, or could know, the lien was created and the debt secured. He has done nothing to impair that security, and it is not competent for the town clerk, by his own parol testimony, to impeach the record, and defeat the attachment.

A record of whatever is required by the statute to be recorded, cannot be contradicted or varied by parol evidence. *Cranmett v. Pearson*, 18 Maine 345; *Pease v. Smith*, 24 Pick. 125; *Saxton v. Nimma*, 14 Mass. 315; *Thayer v. Stearns*, 1 Pick. 109; *Taylor v. Henderson*, 2 Pick. 403; *Manning v. Gloster*, 6 Pick. 16; *Williams v. Ingell*, 21 Pick. 288; *Hutchinson v. Pratt*, 11 Vt. 421; *Sherwin v. Bugbee*, 17 Vt. 340; *Britton v. Lawrence*, 1 D. Ch. 105; and in *Taylor v. Holcomb*, 2 Tyl. 347, the court held, "that they would not suffer a recording officer to impeach his record in a particular instance."

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Converse & Barrett for the defendants.

The evidence as to the time at which the copy of the attachment was actually left with the town clerk, and from which he made a record, and the time at which said record was actually made, was properly received. It does not contradict the record. It merely shows when certain papers, bearing certain dates, were actually made and delivered.

The date attached to any written instrument, furnishes only *prima facie* evidence of the time it was made, but is always open to explanation. 1 Wash. Dig. 293, pp. 17, 18, 20, and cases cited. 2 Wash. Dig. 255, pp. 7, 8.

No attachment was made so as to create any lien, till the copy was left, and the substance thereof, with the return recorded, which was not done till after the defendant took his deed. Stat. 245, § 25, 26. *Cox v. Johns*, 12 Vt. 65.

If a lien was created by leaving a copy, merely, on the 12th of August, it was waived and removed by the officer's erasing his return, and withdrawing the copy. *Sawyer v. Adams*, 8 Vt. 172. citing *Bush v. Cook*; *Huntington v. Cobleigh*, 5 Vt. 49.

The creditor, attaching property, acquires no title or interest in or to it. The officer acquires the lien and interest. He is the only one who can sustain a suit for any interference, with his lien or interest.

He has full power over the property. The creditors have their remedy against the officer, for any neglect or misconduct with reference to it. *Lyman v. Dow*, 25 Vt. 405.

The defendant could not be affected by any notice he had of said attachment, within the doctrine of the case of *Huntington v. Cobleigh*, 5 Vt. 49. If he had any notice, it was accompanied with the understanding and agreement that it was removed.

The declaration of Henry, the officer, to Hiram Aikins, was properly admitted. It was part of the *res gestæ*.

It was a part of the transaction, it was intimately and inseparably connected with the negotiation which resulted in the defendant's taking a deed, and paying full value, under the appearance that all attachments and incumbrances were removed.

The opinion of the court was delivered by
 ISHAM, J. This is an action of ejectment for land in Barnard.

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The plaintiff claims title to the land by virtue of an attachment in his favor against Hiram Aikins et al., and the levy of his execution on the premises. The attachment was made on the 12th of August, 1850. The defendant derives his title to the premises, under a deed from Hiram Aikins, dated November 7, 1850; and he insists that his title is good, as against the plaintiff's previous attachment. It is not disputed but that Hiram Aikins was the owner of these premises at the time of the attachment, nor has any question been made as to the recovery of the judgment, or the regularity of the proceedings in the levy of the execution. The general question in the case arises, whether that attachment was legally made so as to create a valid lien on the premises, and whether that lien was continued, and the title of the plaintiff so perfected under it, as to give him a valid title as against the defendant. From the return of the officer on the writ, it appears that the attachment was made by leaving a copy of the writ in the office of the town clerk in Barnard, with his return thereon, describing the property attached, and like copies in the hands of each of the defendants. That a copy of the attachment was, in fact, left with the town clerk, as stated in the return, is found in the case; but it also appears that no record of it, or any minutes of the town clerk that it was left for that purpose, was made previous to the execution of the deed to the defendant.

Previous to the act of 1823, a lien upon real estate was created when the officer simply left a copy of the writ, with his return thereon, with the town clerk. No other duty was required of the officer by the statute, to create a lien upon the estate. In the case of *Huntington v. Cobleigh*, 5 Vt. 54, WILLIAMS, J., observed, that "previous to the statute of 1823, leaving a copy with the town clerk was the attachment which created the lien, and that which gave notice to all of the incumbrance thereby created." By the act of 1823, it was made the duty of the officer serving the writ, to cause to be recorded by the town clerk, in a book to be kept for that purpose, the substantial part of the writ, with the return of the officer. Under that act, a lien on real estate, by attachment, was not created by simply lodging a copy of the writ with the return of the officer, in the town clerk's office, but it was also his duty to cause the same to be recorded, or, at least, to direct the same to be recorded, and pay the legal fees therefor. Under the previous law all

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persons were compelled to take notice of an attachment when a copy had been left. But, under the statute of 1823, no constructive notice is given, unless the substance of the writ was recorded. That was the doctrine as held in the case of *Huntington v. Cobleigh*, as applicable in all cases where notice in fact of the attachment did not exist. The provisions of the act of 1823 were, in some matters, altered in the general revision of the statutes in 1839, under which the attachment in this case was made. In that revision, there is no express provision that it shall be the duty of the officer to cause the attachment to be recorded. There is nothing required of the officer, in order to create a lien, by attachment, on real estate, but to leave a copy of the writ, with his return, with the town clerk; thus re-enacting, in that particular, the provision of the statute as it existed previous to 1823. It is made the duty of the town clerk, however, whenever a copy of a writ is left with him by an officer, on which real estate has been attached, to enter in a book kept for that purpose, the names of the parties, the date of the writ, the nature of the action, the sum demanded, and the officers return thereon. We think it manifest that it was not the intention of the legislature to make that entry by the town clerk essential for the purpose of creating a lien on the estate. If that had been their intention, they would naturally have continued the provisions of the act of 1823, which, as it was held in the case in the 5th Vt., expressed that intention by specific provisions; neither would they have removed the duty of causing that record to be made from the officer serving the writ, and made it the exclusive and official duty of the town clerk. So important a change in the provisions of the statute on this matter would not have been made unless it was their intention to alter the then existing law on that subject, as it had been held in the case of *Huntington v. Cobleigh*, 5 Vt. 54; neither would they have incorporated in the revised statutes, the provisions of the act of 1797, in its identical language, unless it was their intention to re-enact the law, as it existed under that act, and as it existed until the act of 1823. We think, therefore, that a lien on this real estate was created by the plaintiff's attachment, when the officer left a copy of the writ, and his return, with the town clerk; and that this lien was unaffected

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by the neglect of the town clerk to enter it upon his book of records.

But it is insisted that, if that lien existed, it was lost when the officer who served the writ withdrew that copy from the town clerk's office, and erased from his return thereon the attachment of the real estate, and substituted an attachment of personal property. It appears from the case that, after the attachment had been made, and for the purpose of enabling the defendant to purchase the premises free from any incumbrance of that character, the officer, without the knowledge of the plaintiff, did make that erasure, and withdrew the copy altogether from the office of the town clerk. This subject involves the inquiry as to the power of the officer over the process, and the property attached, after its service. Until the contrary appears, it is to be presumed that the attachment was made under the directions, and with the assent of the creditor. In the attachment of personal estate, the officer acquires a special property, and the right to its custody and possession. For any injury to it, the right of action is in the officer, as, in any termination of the case, he is accountable for the property either to the creditor or debtor. That special property the officer may release, so as to destroy any lien upon the property created by the attachment. He may permit the possession of the property to remain with the debtor, in which case it can be held by a subsequent attachment, or a subsequent purchaser, free from any lien or claim of the officer upon it. His right over that property is independent of the creditor or debtor, as, in a given event, he is responsible for it to the debtor, and in another event to the creditor; and that right exists so long as that special property continues in him. But we apprehend a different rule applies in the attachment of real estate. When such an attachment is made, the officer acquires no special property in the land. He is not required or authorized to take the possession of it, nor in any event is he accountable for the property, or for its rents, incomes, or profits. This agency and authority is terminated whenever his duties are performed, for which the process was put into his hands. The lien created by the attachment, whatever may be its character, is in the creditor, and he only can release or discharge it. We

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think, therefore, that the lien of the plaintiff on this real estate was not lost by that act of the officer, and that the defendant, in taking a conveyance of these premises, took the same subject to the lien of the plaintiff, under that attachment. The defendant has no reason to complain of the application of this rule. He had notice in fact, of the attachment and lien of the plaintiff, and is chargeable with the knowledge that it was not competent for the officer to discharge it. There would be no injustice, either, if the defendant had received his conveyance in ignorance of that attachment, or of the plaintiff's lien. In that event, the question would simply be, which of these parties should have their remedy against the town clerk for his neglect to make a record of that attachment. As the plaintiff first acquired a lien upon these premises, and as that lien has ripened into a valid title to the land, we think it must prevail against the defendant's deed; particularly as the conveyance was taken by the defendant with notice, in fact, of the right and lien of the plaintiff upon these premises.

The declarations of Henry, the officer by whom the attachment was made, we think were improperly admitted as evidence to the jury. The object of that testimony was to show that the attachment of the real estate was made by him, without any directions to that effect, by the plaintiff. Whether those declarations would have been admissible for that purpose, if they had been made at the time of the attachment, and when the copy of the writ was left with the town clerk, we are not called upon to decide. But, as they were made some time afterwards, and upon another occasion, they cannot be treated as a part of that transaction, and are not admissible to affect, in any way, the lien or title of the plaintiff to these premises. This view of the subject renders it unnecessary to examine other questions which were raised in the case.

The result is, that the judgment of the county court must be reversed, and the case remanded.

Chester v. Wheelock.

THE TOWN OF CHESTER v. THE TOWN OF WHEELOCK.

Order of removal unappealed from; in what respects conclusive.

If, in an order of removal of a man, a particular woman be named as his wife and is ordered to be removed with him, such order will, if not appealed from, be conclusive against the town to which they are ordered to be removed as to the existence of the relationship of husband and wife between them.

And the order will be as conclusive, in this respect, when a copy of it is duly served as provided by statute, as when the paupers are actually removed.

APPEAL from an order of removal of one James S. Willey, Obera, his wife, and five children, from the town of Chester to the town of Wheelock, which was made on the 8th of February, 1853. Plea, that the paupers were unduly removed, because their last legal settlement was not in Wheelock; trial by jury, May Term, 1855,—UNDERWOOD, J., presiding.

The town of Chester read in evidence an order of removal of the same Willey and wife, &c., dated the 16th of January, 1849, and gave evidence tending to show that a copy of said order, duly certified by the justices' making it, was served on the overseer of the poor of the town of Wheelock, on the 14th of February, 1849, and then rested the case. This order mentioned "James Willey, and his wife Obera Willey, and his four minor children."

The defendants offered to prove that said James S. Willey was duly married to one Betsey Sweet in Rhode Island, in the year 1816, before he was married to or lived with said Obera; that the said Betsey was still living, and that no divorce had ever been had between them; and that said Obera was never married to said Willey; and that the five children who were removed under the present order, were the children of the said Obera; and that said Willey never had any children by said Betsey. To this testimony the plaintiffs objected, and the same was excluded by the court, to which the defendants excepted.

The court instructed the jury that if they found from the evidence that a copy of the order of removal of 1849, duly certified by the justices making it, was delivered to the overseer of the poor of Wheelock, on the 14th of February, 1849, or within thirty days from the time it was made, the plaintiff was entitled to recover. The jury returned a verdict for the plaintiff that said Willey, Obera and five children were duly removed.

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O. P. Chandler and *W. Collamer* for the defendant.

L. Adams for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. This is an order of removal of James Willey, his wife and family, from Chester to Wheelock. Upon the trial, Chester depended upon a former order of removal, upon the said Jas. Willey, his wife Obara Willey, and four minor children, made the 19th day of January, 1849, and unappealed from. It does not appear that any actual removal was made in the case; but a copy of the order was served upon the town of Wheelock, within thirty days from its date. The complaint before the justices, and the warrant to apprehend, and bring the paupers before the justices, names only James Willey; but the order is in the terms above stated. The same persons are included in the last order, which were in the first order, with one more child. Upon the trial the town of Wheelock offered to prove that the said Obara was not the lawful wife of said James, he having a former wife still living. This testimony was rejected by the county court, upon the ground that the former order was conclusive of the legality and sufficiency of the marriage. This is admitted to be the settled rule of the English law upon the subject, where the paupers are to be actually removed before an appeal is required to be taken. By the law of this state, an appeal is required to be taken upon serving a copy of the order of removal within thirty days, which was done in the present case. And the appeal not being taken, the order became conclusive of the settlement of James Willey himself, but it is claimed it will not have that effect as to the woman and children, unless there was an actual removal. But it seems to us impossible to adopt this distinction.

In the English pauper orders, the wife and children are, in practice, each one named, and are perhaps required to be so named. That is required in some of the early cases in this state; *Hartland v. Williamstown*, 1 Aiken 241. But it is said, in this same case, that although this be not done, if the order be acquiesced in, it will be sufficient. And in *Newbury v. Brunswick*, 2 Vt. 151, such an order was quashed as to the wife and family, and held binding only as to the pauper himself. But in *Bristol v. Braintree*, it seems

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JOHN BRALEY v. WILLIAM S. FRENCH AND CELIM FRENCH.

Attachment of real estate. Evidence.

An attachment of real estate is effected by the officer's leaving in the town clerk's office, a copy of the writ, with his return of such an attachment thereon. The making of the record or entries respecting it, which it is the duty of the town clerk to make, does not constitute any part of the attachment itself.

By such an attachment, the officer acquires no special property in the real estate, and has thereafter no control over the lien thereby created. This lien can only be released or discharged by the creditor himself.

It will be presumed, until the contrary is shown, that an attachment of real estate was made under the direction and with the assent of the creditor; and declarations of the officer, made after the attachment, are not admissible for the purpose of showing that the attachment was not so made.

EJECTMENT for a piece of land in Barnard. Plea, the general issue; trial by jury, May Term, 1855,—UNDERWOOD, J., presiding.

The plaintiff's evidence tended to show an attachment of the premises in question, as the property of Hiram Aikins, on the 12th of August, 1850, upon a writ in favor of the plaintiffs against the Aikins and others; a judgment recovered on said writ; the issuing of an execution and levying it upon the premises, before the expiration of the attachment lien. To defeat the title thus claimed, the defendants offered testimony tending to prove that, at the time said attachment was made, August 12, 1850, several other creditors of Hiram Aikins, made attachments of the same real estate, by causing copies to be left at the town clerk's office of Barnard, and that Gilman Henry was the officer who made the plaintiff's attachment, and several of the others; that afterwards, and before the session of the court, to which the plaintiffs writ was returnable, a negotiation was entered into between said Hiram and his attaching creditors, with the exception of the plaintiff, for the withdrawal of their attachments, and for the sale of the premises to the defendant, William S. French; and that he declined to purchase until all said attachments could be removed, and that this was made known to said Henry; that the other creditors withdrew from the office of the town clerk the copies which had been left in their suits, so as to enable French to make the purchase free and clear of their attachments, the town clerk having made no record or minutes of any of the attachments according to the statute; and

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that said Henry, without the knowledge or consent of the plaintiff or his attorney, erased from the return on the copy of the plaintiff's writ which he had left in the town clerk's office, that part of the return that related to the attachment of real estate and substituted a return of attachment of certain personal property; and that he also withdrew said copy altogether from the town clerk's office; and that he told said Hiram Aikins, on that occasion, he had not been directed by the plaintiff to attach real estate; and that directly after all this, the defendant, William S. French, made the purchase, took his deed, and put it on record.

The defendant called the town clerk of Barnard as a witness, who produced his book of records of attachments which showed an attachment of said real estate, on the plaintiff's writ, as having been made August 12, 1850; and also produced a copy of said writ, and said Henry's return of such attachment thereon, and a minute on the back thereof, of its having been received for record, August 12, 1850, and proposed to show by said town clerk, that said copy was, in point of fact, delivered to said town clerk, by said Henry, and said record made as late as the winter of 1850-'51, after the record of the defendant's deed; and that the town clerk made the minute on the back thereof, at that time, ante-dating it to the 12th day of August, 1850, by the request of said Henry, and made his record from that copy. To the admission of all said testimony the plaintiff objected, but the court admitted it, to which the plaintiff excepted. The court charged the jury that if said Henry, under the circumstances which the testimony tended to show, after having left a copy of the plaintiff's writ, and before any record or minutes thereof were made by the town clerk, withdrew the copy left on the 12th day of August, 1850, or erased therefrom the return of the attachment of real estate, to enable the defendant to take a deed of the premises unincumbered, from Hiram Aikins, and said defendant took his said deed and put the same on record before a subsequent copy of the plaintiff's attachment was left and recorded, as of August 12, 1850, then the defendant was entitled to a verdict, even though the plaintiff had no knowledge of such withdrawal or erasure by said Henry. To this charge the plaintiff also excepted. The jury returned a verdict for the defendant.

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expression of his opinion on the subject, to withhold the actual continuance of the case, until the application for its discontinuance was disposed of. The court having granted liberty to discontinue the case, and a record of that discontinuance having been made, its effect will necessarily be to supersede the motion for a continuance.

We must regard that suit, therefore, as having been discontinued on the 22d of March. This suit, having been commenced on the 23d, the day after, we think, was properly brought.

The judgment of the county court is affirmed.

JOHN DOWNER v. LEVI H. MARSH; ALVAN TUCKER, *Trustee*;
SOLOMON DOWNER, *Claimant*.

Trustee process. Notice of transfer of note.

A notice to the maker of a promissory note that it has been transferred, if sufficient to prevent his paying it to the original payee, will suffice to prevent him from being holden as the payee's trustee.

TRUSTEE PROCESS. The trustee, among other things, disclosed that on the 18th of April, 1853, he purchased a farm of the principal defendant, towards the consideration of which he executed and delivered to the principal defendant his note for \$215. Solomon Downer claimed to be the owner of this note, and, upon a trial by the court, in reference to his claim, at the May Term, 1855,—UNDERWOOD, J., presiding,—it appeared that at the time said farm was sold and the deed of the same executed and delivered, which was in the afternoon of the 18th of April, the defendant Marsh, the trustee Tucker and the claimant Solomon Downer were all present; that at that time the defendant Marsh was indebted to the claimant Downer in a sum estimated at \$215, but the account had not then been fully passed upon or definitely settled by them; the note was taken for the purpose of paying said debt, and this was understood by the trustee at the time he exe-

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cuted it. After the delivery of the deed to the trustee, he went to the town clerk's office to leave it for record, and the defendant Marsh and the claimant went to the house of the latter.

After the trustee left his deed, he started for home, and as he was going by the claimant's house, he was called in. While there, the defendant and claimant were looking over their accounts, and some question arose between them about one of the charges, and the trustee left, leaving them together, expecting them to close the accounts, and that the claimant Downer would receive the note that night. It also appeared that they did close the accounts that night, after the trustee left, and the note was then delivered in payment of the account, as had been before arranged and expected. The next day the trustee writ was served before the trustee had any further information of the transaction, or of the actual transfer of the note, other than what he learned previously to his leaving the house of the claimant Downer the evening previous. Upon these facts, the court rendered judgment against the claimant, and adjudged that the trustee was liable for the amount of the note in question, to which the claimant excepted.

Washburn & Marsh for the claimant.

W. C. French and Converse & Barrett for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. The only question in this case is, whether the plaintiff or the claimant is entitled to the note in question. As we intimated, during the argument, this will depend upon the legal effect of what passed between the parties, before the service of the trustee process; whether it was sufficient to vest the title in the claimant, and affect the trustee with legal notice of his title.

It was a part of the price of a farm, sold by Marsh to Tucker. At the time of the conveyance, Marsh, Tucker and the claimant, were present. It was supposed Marsh was indebted to the claimant, upon book, in a sum equal to the note, \$215; but the account was not definitively settled; the note was taken for the purpose of paying the claimant this debt, and to be delivered to him; and this was understood by Tucker at the time he executed it.

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Tucker went to the clerk's office, and left his deed for record, and, as he passed the claimant's house, he was called in by Marsh, when he found him and Downer settling the account, and some question arising about one item, Tucker went home, leaving the claimant and Marsh settling the account, expecting them to close it that night, and Downer to receive the note. It was so done, and the note delivered to Downer that night, in payment of the account, as had been before arranged, and expected by all the parties concerned. The trustee process was served the next day.

It seems to us that this must be regarded as sufficient notice to Tucker of Downer's interest in the note. This question of notice, in cases like the present, is to be viewed as it would be between the claimant and the trustee, if he had paid the note to the principal debtor, at the time of the service of the trustee process. Had that been the case here, we think there can be no doubt it should be regarded as a fraud upon Downer, and he would be entitled to collect the note of Tucker, notwithstanding such payment. Tucker, from the facts, had no reason to doubt that the title of the note, and the possession was in Downer, and it was so in fact; this shows title in the claimant, and sufficient notice.

Judgment that trustee is not liable, in regard to this note, and that the claimant recover costs in this court; and judgment for the plaintiff for the amount found in trustee's hands, besides this note, and such costs as shall be equitable in the county court.

GEORGE LYMAN v. NORWICH UNIVERSITY.

Ratification of act of agent. Statute of limitations.

The president of the defendant's borrowed fifty dollars of the plaintiff for the defendant's, to be expended on their buildings, with the understanding that it should be repaid to the plaintiff. The money was paid into the defendant's treasury and used for the purpose intended. *Held* that this receipt and expenditure of the money was a ratification, by the defendant's, of the act of their president, and bound them to a re-payment of the money, even though the president exceeded his authority in so borrowing it.

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Neither the individual admissions of the members of a corporation, established for public purposes and not for the promotion of the private interests of the corporators, nor the personal admissions of its president, or of the individual members of its executive committee, respecting a debt due from the corporation will prevent the operation of the statute of limitations upon it.

BOOK ACCOUNT. The disputed item in the plaintiff's account was for "cash to repair buildings as per H. S. Wheaton's (president,) accountable receipt, April 3d, 1848,—\$ 50," in reference to which the auditor reported as follows.

"In the year 1848, Henry S. Wheaton was president of the Norwich University. After his election an effort was made to raise money by subscription to repair the college buildings. That effort did not succeed, and in a conversation between the president, Mr. Brewster, a member of the corporation, and the plaintiff, who, also, was a member of the corporation, the plaintiff proposed to be one of six, who would advance the sum required,—three hundred dollars; and for that purpose would loan fifty dollars, with the understanding that it should be re-paid to him. The plaintiff was afterwards informed by the president and Mr. Brewster, that his, (the plaintiff's) proposition had been agreed to, and the plaintiff thereupon delivered to the president fifty dollars, and the president executed to the plaintiff his receipt, which was in the following words.

Norwich University, April 3d, 1848.

"Received of George Lyman fifty dollars to be expended in repairs on the university buildings; and for said expenditure I will account to said Lyman.

H. S. WHEATON, *Pres. N. U.*"

"It did not appear that the president, by any vote of the corporation, was authorized to execute notes or accountable receipts to bind the corporation of the university; and the defendant contended that the above receipt was evidence of a personal transaction between the plaintiff and Mr. Wheaton. A committee had been appointed to make repairs of the college buildings, of which committee the plaintiff was a member, and he considered that for that object he had a right to provide money in this way. It appeared also that, at and about the time when this money was advanced by the plaintiff, the financiering of the university was done by the pres-

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ident, Dr. Davis, and Col. Stimson, all of whom were members of the corporation, although the executive committee, appointed in 1836, and still in office in 1848, consisted of the vice president, the secretary, the treasurer, Dr. Davis and Judge Loveland, and their duty defined by the vote constituting the committee, was 'to take charge of the university buildings, and transact the business of the board, during the recess, and report to the board when called upon by the trustees.'

"It also appeared that by a vote of the corporation, passed March 9, 1835, the president was appointed general agent for the board, to obtain funds in aid of the institution, and that he was authorized to solicit funds in different parts of the country, and that that vote remains unrescinded.

"The auditor finds the fact that the fifty dollars so delivered by the plaintiff to Mr. Wheaton, the president, was paid into the college treasury and appropriated to the use of the university, and went to pay for repairs on their buildings, under the understanding of the plaintiff, that it should be repaid to him.

"The auditor allows the charge, and finds the amount thereof, interest being computed to May 10, 1855, to be seventy-one dollars and thirty-two cents; unless the court, on the facts submitted, consider that the defendant ought not to be charged with the item, and unless the charge is barred by the statute of limitations, which the defendant pleaded verbally before the auditor. The claim has repeatedly, within six years, been acknowledged to be due by Dr. Davis, Col. Nutt, and Mr. Brewster, members of the corporation, and by Mr. Wheaton, when president, and has never been paid to the plaintiff."

With the allowance of this item, the auditor reported the balance in the plaintiff's favor to be \$93.73. The plaintiff's writ was dated November 9th, and served November 10th, 1854.

The county court, upon the report, rendered judgment for the plaintiff for the whole amount reported. Exceptions by the defendants.

————— for the plaintiff.

E. Hutchinson for the defendants.

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The opinion of the court was delivered by

BENNETT, J. In relation to the first item in the plaintiff's account, the auditor submitted two questions; first did the item ever constitute a legal charge against this defendant; and if so, secondly, was it barred by the statute of limitations when the suit was brought?

The case finds, that the defendant proposed to be one of six to advance the sum of three hundred dollars to repair the university buildings; and for that purpose he would loan fifty dollars, with the understanding that it should be repaid to him; and upon being informed afterwards that his proposition had been agreed to, the plaintiff delivered to the president fifty dollars, and took his receipt for the same. The receipt bears date the third of April, 1848; and it specifies that the money is to be expended in repairs on the university buildings; and it adds, "and for said expenditure I will account to said Lyman." It is signed "H. S. Wheaton, President of N. U."

Mr. Wheaton paid the fifty dollars into the college treasury, and the money was appropriated to the use of the university, in paying for repairs on the buildings, with the understanding of the plaintiff, it should be repaid to him. After such a state of facts, it is quite too late for the defendants to assume the ground that the president had no authority to bind the university to refund this money. It was a full ratification of his acts on the part of the corporation, even though it should be conceded that in taking up the loan, the president in the first instance transcended his authority. But this is not, by any means, a conceded point.

In regard to the statute of limitations, it is clear that it had run on this item before the suit was commenced, unless removed by the admissions of the individual members of the college corporation. The loan was to the corporation to aid in the repair of their buildings, and not to president Wheaton, and he did not agree to see the money refunded personally.

The most that can be claimed is that Mr. Wheaton, as president of the university, undertook to see that the money should be expended in repairing the buildings; and the case shows that it was applied for such purpose. It has been said in argument, that six years had not run after the right of action had accrued before suit

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was commenced. It seems the writ issued the 9th of November, 1854.

No time is fixed specifically when the money was to be repaid; but at all events we think it was a fair implication, that the money was to be repaid within a reasonable time; and that no special demand was necessary. The money was advanced the 3d of April, 1848; and most certainly it was reasonable that it should have been refunded before the 9th of November of the same year. The case, I think, does not show the precise time when the repairs were made on the college buildings, but it is reasonable to suppose they were made in the early part of the season of 1848; and at all events, we think the right of action accrued to the plaintiff before the 9th of November, 1848. The question then arises, what shall be the effect of the admissions of the individual members of the corporation? The fact that it is found that this money had never been repaid cannot remove the statute bar. A party may admit the debt unpaid, and still claim, at the same time, the benefit of the statute bar. To remove the statute bar there must at least be an *implied promise* to pay the debt. It has sometimes been held that the admissions of a member of a corporation may be given in evidence against the corporation, where there is a joint interest, as in the case of rateable inhabitants of a parish or town; but where it is a mere community of interest, the law, at the present day, is well settled that such admissions cannot effect the rights of a corporation. See 1 Greenleaf's Ev. sections 175, 176; Angél & Ames on Corp. 302, 592; *Hartford Bank v. Hart*, 3 Day 494; *Fairfield County Turnpike Company v. Thorp*, 13 Conn. 494; *Osgood v. Manhattan Bank*, 3 Cowen 623; *Bank of Oldtown v. Houghton*, 21 Maine 507; *Polleys v. Ocean Insurance Company*, 14 Maine 141. In the case before us, there can hardly be said to be even a community of interest, and much less a joint interest. There is a wide difference between this corporation and one established for private hazard and profit. The promotion of education is the cardinal object of this corporation; and it was not established to promote the private interests of the corporators. The admissions of President Wheaton stand upon the same ground as those of any other member of the corporation. His being president of the faculty, gives him no additional powers, or control over the funds of

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the corporation. Though it is found that the president and Doct. Davis, at, and about the time this money was advanced, were members of the financial committee, yet it is not shown what the powers of that committee were; and it does not appear that they were members of that committee when the admissions were made, unless we are to presume they continued in such office. It does appear that Doctor Davis was elected one of the executive committee in 1836, and was still in office in 1848, yet it is not found that he was a member of that committee at the time the admissions were made by him.

That committee consisted of five individuals, and their business was "to take charge of the university buildings, and to transact the business of the board during the recess." If that committee had full powers over the financial affairs of the university when the board of trustees was not in session; yet it could not be bound by the individual action of one of the committee. The trust was a *joint one*, and must, at least, be discharged by a major part of the committee. One member might as well release a debt without satisfaction, as impose a liability upon the corporation by an admission.

We think, then, this item of fifty dollars is barred, and the judgment of the county court is reversed, and judgment for the plaintiff for \$21.39, adding the interest on it from the time of the report of the auditor.

ALFRED PAIGE v. ISAAC T. MORGAN, *apt.**Evidence. Jurisdiction. Interest.*

Proof by a physician's books, and his own oath, that his charges in question were made at his usual rates of charge for similar services for other persons, in the same neighborhood, whom he attended, is admissible, in connection with proof that these rates were known to the person charged.

If testimony before an auditor would have been admissible in any view, or in connection with any other evidence, and it appears that it was offered and admitted

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"among other things not objected to," which are not more particularly stated, it cannot, on exceptions, be held to have been inadmissible.

An article sold conditionally, to be returned if it did not suit the purchaser and which was so returned, may, though it was regularly charged on the plaintiff's book at the time of its delivery and credited at the time of its return, be wholly omitted from the account; and, if so omitted, will not be treated as a part of the account for the purpose of placing it beyond the jurisdiction of a justice.

It is optional with the plaintiff whether or not to claim interest upon an account to which he is fairly entitled; and the jurisdiction of a justice will not be affected by any just claim which he might, but does not make; or which, having made, on the mistaken ground that the justice's jurisdiction would not be exceeded, he abandons.

BOOK ACCOUNT. The plaintiff's account was for services as a physician, which the auditor allowed as charged.

On the hearing before the auditor the defendant objected to some of the plaintiff's items of account, as being charged too high, and unreasonable; and, to show that they were not so, the plaintiff, among other things not objected to, offered to show by his books, and his own testimony, that the charges were made at his usual rates for similar services, in the same neighborhood, for other persons for whom he attended. To the admission of this testimony the defendant objected, but the auditor admitted and weighed the testimony for the purpose above named.

The action was regularly commenced before a justice, and came into the county court by appeal. The defendant claimed that the justice had no jurisdiction. It appeared that there was charged to the defendant, on the plaintiff's book, "1 supporter, \$5.00," under date of August 12, 1854, that was not included in the account of the plaintiff presented before the auditor. In relation to this the auditor found that the sale was regarded by the plaintiff as conditional, and that the article was delivered by him at the time of the charge, with the expectation that the defendant would keep and pay for it, if it answered the purpose for which it was wanted, but if it did not, or was not liked, it was to be returned and received back by the plaintiff. The article was subsequently returned, for some or all the reasons stated above, and was entered by the plaintiff to the defendant's credit, as "returned," under date of November 20, 1854.

At the trial before the justice, no claim was made by the plaintiff for this item, but the plaintiff did claim, as interest on his ac-

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count at the time of that trial, the sum of \$8.56, which was entered in and made part of his exhibit before said justice, but was never entered upon his book. The amount of the plaintiff's account on book, including the price of the supporter, as charged, and adding thereto the interest, as claimed by the plaintiff before the justice, would make the debit side of the plaintiff's account exceed \$100; but leaving out either the supporter or interest, it would be less than \$100.

Upon the foregoing facts presented by the report of the auditor, the county court, December Term, 1855,—UNDERWOOD, J., presiding,—overruled the defendant's motion to dismiss, and rendered judgment for the plaintiff on the report. Exceptions by the defendant.

I. T. Morgan, pro se.

The interest which has accrued and is due on an account when suit is commenced is a part of the account, whether actually entered on book or not, and regarded as so much principal; *Nichols v. Packard*, 16 Vt. 91.

By Comp. Stat. 223, § 20–21, it is declared that for the purpose of determining the jurisdiction of justices, the debit side of the plaintiff's book shall be considered the "debt or matter in demand."

"The plaintiff's book and the debit side of that book affords the *only rule* by which the jurisdiction of the justice is to be determined." *Nichols v. Packard*, 16 Vt. 91; *Beach v. Boynton*, 26 Vt. 105.

The fact that the plaintiff regarded the sale of the supporter conditional, depending on the circumstances detailed in the report, cannot affect the question of jurisdiction. The charge was properly made, [as admitted by the plaintiff by the fact of making it,] and it constitutes a part of the debit side of the book, as properly as any other charge. Property lent is properly chargeable on book, at the time of lending; 2 Wash. Dig. 141, p. 6; 16 Vt. 428, *Stone v. Pulsipher*; 2 Wash. Dig. 141, p. 8.

The auditor erred in admitting the testimony objected to. That the plaintiff had charged other persons in the neighborhood at the same rate is no evidence that his prices are just and reasonable.

A. P. Hunton for the plaintiff.

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The opinion of the court was delivered by

REDFIELD, CH. J. I. The testimony offered to show that the charges made in the case were according to the defendant's ordinary rates of charge to other persons in the vicinity, might be proper enough, in connection with other proof, that his rates of charge were well understood, and did, in fact, come to the knowledge of the defendant; and, possibly, as showing part of the general and customary charge in the county, for similar services, but of less account in this latter view. And, as we do not know what other testimony was in the case, the auditor expressly stating that this testimony was offered among other things not objected to, or in what view it was received, we could not hold it inadmissible, if it could be made to bear upon the question before the auditor, in any view, or in connection with any other evidence; *Vilas v. Downer*, 21 Vt. 419.

II. In regard to the question of jurisdiction, it will appear, by the decisions upon the subject, that the court has generally adopted a construction of the case favorable to sustaining the jurisdiction, where it is apparent that the jurisdiction was invoked in good faith. But, of course, this is not always decisive of the case. Often the party mistakes the law, in an obvious particular, which no reasonable construction cures. But, in the present case, we can entertain no doubt the suit was brought before the justice in the most perfect good faith, and that it probably might have been brought, by the defendant's counsel, in the most perfect good faith, in the county court. And, if it had been brought so, and the supporter continued upon the account, and the interest too, I should have been prepared to sustain the original jurisdiction of the county court. But it seems to us that the supporter was more properly treated, at the time the suit was brought, as forming no part of the account. It was delivered upon trial, and, if it proved unsatisfactory, was to be returned and taken back and no charge made for the same. It was so returned before the suit was brought. There clearly was no account to render in regard to this item, and the keeping it upon the account was a mere fiction, and, it seems to us, it would be regarded as a very singular construction to declare it a necessary part of the account, and dismiss the action on that ground.

So, too, in regard to interest upon an account, it is optional with

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the party whether to claim it or not, and a suit will not be dismissed because the party is fairly entitled to recover it, and by adding it the sum exceeds the jurisdiction. This item is not upon the book, and, if the party had entered it, upon his exhibit, on the mistaken ground that it did not swell the account above \$100, and it finally, for any reason, were proved to do so, we think he might be allowed to correct his mistake, by striking it out, and that this is only going to the extent of the principle of the case of *Scott v. Sampson*, 9 Vt. 339; see also *Callin v. Aiken*, 5 Vt. 177; *Stone v. Winslow*, 7 Vt. 338.

Judgment affirmed.

CHESTER BAXTER v. ABIATHAR SHAW.*Amendment. Scire facias. Pleading.*

A writ of *scire facias*, alleging only the rendition of the judgment, and that execution yet remains to be done, may properly be amended by adding averments showing that the apparent satisfaction of an execution already issued, was by a levy upon, and sale of property which was subsequently claimed and held by a third person.

The levy of an execution upon property of the debtor, upon which there was a prior lien by attachment, in favor of a third person, which was unknown to the creditor, to the satisfaction of which the property was subsequently appropriated, is a levy upon property "which did not belong to the debtor," within the meaning of the statute, (Comp. Stat. 315, § 46,) giving to the creditor a new execution in such a case. The statute extends to cases where the debtor, though having the general ownership, yet has no such title to the property, as can be made available to the levying creditor.

The declaration in the present case held defective, on demurrer, in not alleging a continuance and perfection of the prior attachment lien, by a reasonable issuing of the execution, and charging of the property.

SCIRE FACIAS. The declaration, which is set forth below, did not contain, when originally drawn and entered in the county court, that part of it which is enclosed in brackets. The plaintiff obtained leave to amend, and did amend the declaration

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by inserting that part of it, and when so amended, the defendant moved to dismiss it for the reason that it then described a new cause of action. This motion was overruled, and the defendant then demurred to the declaration, as amended. The county court, December Term, 1855,—UNDERWOOD, J., presiding,—overruled the demurrer, and rendered judgment for the plaintiff. To the decision of the court overruling both the motion to dismiss and the demurrer, the defendant excepted.

The declaration, as amended, was as follows, that part added by the amendment being enclosed in brackets.

"Whereas Chester Baxter, of Sharon, in the county of Windsor and state of Vermont, by the consideration of the county court, held at Woodstock, in and for the county of Windsor, on the fourth Tuesday in September, in the year of our Lord one thousand eight hundred and thirty-eight, recovered judgment against Abiathar Shaw, then of Westmoreland, in the state of New Hampshire, for the sum of thirteen hundred and fifty-nine dollars and sixty-two cents damages, and twenty-five dollars and fifty-eight cents costs of said suit, as appears of record; and although judgment thereof be rendered, as aforesaid, [and the said Baxter within thirty days after the rendition of the aforesaid judgment, to wit, on the 29th day of September, 1838, took out his execution thereon, and placed it in the hands of F. Page, constable of the town of Sharon, in said Windsor county, who, on the 26th day of October, 1838, levied and extended said execution on the following named machinery in a factory, to wit, 3 casmer looms, 1 satinet loom, 1 dresser loom, 1 condenser, 3 spools, 2 carding machines, 1 shaving machine, 1 brushing machine, 1 roller, 38 press plates, 2 jacks, 1 lot of bobbins, 6 joints stove-pipe, 32 shuttles, all the leather belts for factory, 1 iron mortar, 2 oil canisters, 1 netty, 1 loom, amounting in the whole to the sum of eleven hundred and forty dollars and seven cents, which the said Page, constable as aforesaid, applied upon said execution, in part satisfaction of the same, supposing the same to be the property of said Shaw, but it afterwards proved to be the property of one Elisha L. Sabin, and in the year 1837 was attached by A. F. Bean, on a writ in his favor against said Sabin. After said attachment, said Sabin sold said machinery to said Shaw, and after said Bean's attachment, and said sale to Shaw, the

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plaintiff levied upon, and caused said property to be sold, as the property of said Shaw, upon his aforesaid execution, without knowing of said Bean's attachment. Said Bean's suit, upon which said property was attached, as aforesaid, was pending in court, at the date of the plaintiff's sale of said property, but subsequent to said last named sale, on the plaintiff's aforesaid execution. Said Bean recovered judgment in his aforesaid suit, against said Sabin, and caused all of the aforesaid property to be sold in due form of law, in satisfaction of an execution issued upon said last named judgment, in favor of said Bean against said Sabin, and the said Bean took all of said property out of the plaintiff's possession, and the plaintiff entirely lost said property, and the proceeds thereof.] Yet the execution of the said debt and costs yet remains to be made, whereof the said Baxter has made application for a remedy to be provided in that behalf. Now to the end that justice be done," &c.

Washburn & Marsh for the defendant.

The count is bad under the order to amend, as not following the original declaration, but being, in fact, for a new cause of action, not embraced within, nor contemplated by the original declaration. It is a departure.

The original writ was *scire facias*, at common law, to obtain a new execution. The writ, as amended, is *scire facias*, under the statute, to vacate the levy of an execution.

Scire facias would not lie at common law, to obtain this remedy; and the writ of *scire facias*, which is given by statute for this purpose, is a new and independent proceeding. *Baxter v. Tucker*, 1 D. Ch. 355. *Royce v. Strong*, 11 Vt. 249. *Hyde v. Taylor*, 19 Vt. 601. *Pratt v. Jones*, 22 Vt. 345. *Tudor v. Taylor*, 26 Vt. 448.

The writ in the form in which it is presented cannot be sustained.

It is *scire facias* to vacate the levy of an execution, which has been satisfied by being extended upon property, which was subject to a prior attachment.

At common law, *scire facias* would not lie in this case. See the cases cited above.

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By the levy and sale of the personal property, the judgment is satisfied *pro tanto*, even though the title be afterwards divested. 1 Salk. 322. 2 Ld. Raym. 1072. 1 Cow. 47, n. 4 Cow. 417. 7 Johns. 428. 12 Johns. 207. *People v. Hopson*, 1 Denio 574. *Freeman v. Caldwell*, 10 Watts 9. *Ladd v. Blunt*, 4 Mass. 402. *Bayley v. French*, 2 Pick. 590. *Lea v. Edwards*, 1 B. & Ald. 157. *Chandler v. Forbush*, 8 Maine 408.

The statute of 1797, (Slade's Stat. 213, § 9,) extended only to a case, where it appeared, after levy upon real or personal estate, that the property "did not belong" to the debtor.

Under that statute this suit could not have been maintained ; for here the declaration concedes, that Sabin owned the property, and sold it to the defendant.

The statute of 1850 (Comp. Stat. 315, § 46,) re-enacted the statute of 1797, and extended it to cases where the property levied upon was, at the time, subject to mortgage, which was disregarded in making the levy.

But that is not this case. An attachment is not a mortgage, and "*expressio unius exclusio alterius est.*" A mortgage passes the title ; an attachment does not. A subsequent mortgagee must be made a defendant in a bill to foreclose a prior mortgage ; but an attaching creditor, who has not obtained a judgment, need not and ought not to be made a defendant. *Downer v. Fox*, 20 Vt. 388. The law stands, in respect to property levied upon while subject to attachment, precisely as it stood in respect to mortgaged property, previous to the statute of 1850, and, in respect to property which did not belong to the debtor, previous to the statute of 1797. It is *casus omissus*, beyond the reach of the court, and subject only to legislative correction.

The declaration is fatally defective in omitting to allege that Bean kept good his title, created by the attachment, by causing the property to be charged in execution, within thirty days after his judgment.

The creditor who seeks a new execution, upon the ground of defect of title in the debtor to the estate levied upon, must show, by positive evidence, that such defect existed ; *Pratt v. Jones*, 22 Vt. 345 ; and what he is thus bound to prove, he must allege in his writ ; *Baxter v. Tucker*, 1 D. Ch. 356.

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Stoughton, French, and Converse & Barrett for the plaintiff.

The first question is, should the motion to dismiss have prevailed?

This depends altogether upon the question whether the county court had power to allow the amendment. If they had, its exercise is not a matter of error. *Waterman v. Hall*, 17 Vt. 128.

The original declaration was *scire facias*. The amended one is *scire facias*.

This question must be conclusively settled by the case of *Briggs v. Oaks*, 26 Vt. 138, and the case of *Briggs v. Bennett et al.* 26 Vt. 146.

The demurrer was properly overruled.

The matter set up in the declaration, is sufficient to bring the case within the statute, (Comp. Stat. 315, § 46.) Clearly "the property was not the property of the debtor."

The whole was taken, sold and applied upon Bean's execution by virtue of the attachment.

It comes, if not within the letter, certainly within the spirit, and clear intent of the statute.

The opinion of the court was delivered by

BENNETT, J. It is well settled that if a judgment appears of record to have been satisfied, no *scire facias* will lie, at common law, to get a new execution awarded; but our statute has extended the right to maintain a writ of *scire facias*, to get a new execution, to cases where the apparent satisfaction, on record, has been produced by the sale of property, which turns out not to belong to the debtor. This, no doubt, is the case, the plaintiff supposed he had made in his original declaration, but the trouble with that was, it was not adapted to his case, and would not let in his proof. It is quite usual to permit the plaintiff to amend his declaration, so as to make such a case as he intended to have made in his first declaration. He may so declare as to show he has no legal ground of action, or he may mistake the legal effect of a written contract, yet he may so amend his declaration, as to give a cause of action, or avoid the effect of a variance, and we have no doubt, it was within the province of the county court, to allow the amendment asked for in this case.

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It becomes necessary, to settle the rights of the party on the demurrer, to see if the case, which the plaintiff claims to have made by his new declaration, is one entitling him to maintain a *scire facias* under our statute. The plaintiff levied his execution upon certain machinery, and sold it as the property of the defendant, and the avails of the sale were applied on his execution. The machinery originally belonged to one Sabin who sold it to this defendant, and, while Sabin owned it, one Bean attached it as the property of Sabin, and it was subject to this attachment when Sabin sold it to the present defendant, (though this attachment was not known, in point of fact, to the plaintiff, at the time of his levy and sale,) and Bean having obtained a judgment after this against Sabin, took out his execution in due time to preserve his lien, and levied upon and sold the property in due course of law, by means of which the defendant's title to the property, under his sale from Sabin, was defeated. This is such a case as the plaintiff, in argument, claims his new declaration makes, and the defendant insists that such a case is not within the statute. The statute enacts, that "when any execution shall have been extended or levied upon any estate, real or personal, for the purpose of satisfying such execution, and it shall afterwards appear that such estate did not belong to the debtor, the creditor may sue out a *scire facias* to get a new execution."

The case claimed to have been made is clearly within the reason of the statute. Though Sabin remained the general owner of the property after Bean's attachment, yet he could only sell such right as he had and his vendee would take it subject to Bean's attachment. The officer had a special property in the chattel attached, and a paramount right of possession. The attachment created a lien upon the property, and one that was even recognized as such under the last bankrupt law of the United States. When this property was sold to satisfy Bean's debt, against Sabin, in virtue of the lien created by the attachment, the defendant's right to it, under his purchase from Sabin, became extinguished. His right at all times was dependent upon the attachment, and when sold to satisfy Bean's lien, it is the same thing to the plaintiff as if there had never been a sale in form from Sabin to this defendant. The statute is highly remedial, and should be so construed as to embrace

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cases coming clearly within its equity. The ultimate failure in the defendant's title may well have relation back to the time the adverse lien was created, and when the statute uses the term, "such property as did not belong to the debtor," it should be understood to embrace cases in which the debtor had no such title to the property as could be made available to the levying creditor. This is the very essence and spirit of the act.

But the plaintiff has not made such a case in his declaration, as he has supposed in argument. The declaration does not allege that Bean's execution was taken out, and the property charged with it, in time to preserve the lien; and this should affirmatively appear. If this was not done, the right of the defendant to the property would be paramount to Bean's. The declaration alleges that Sabin's title passed, subject to the attachment to the defendant, and except for the attachment, the defendant's title would have been valid.

Enough, then, must have been alleged to show that the property was taken from the defendant in virtue of the lien existing upon it, when sold by Sabin to the defendant.

The judgment, then, below is reversed, for the insufficiency in the declaration.

The plaintiff had liberty to amend on the usual terms.

NORMAN PAUL v. SCHOOL DISTRICT NO. 2 IN HARTLAND.

School teacher; time of obtaining certificate;—and sufficient cause for dismissing.

The plaintiff contracted to teach school for the defendants, and on the morning of the day he commenced, and before commencing his school, he applied to the superintendent for examination and a certificate; but the examination was, at the request of the superintendent, and upon his assurance that it would be as well postponed until evening, at which time, after the commencement of the school, an examination was had and a certificate given; and after this the school proceeded, for about seven weeks without objection and without any new contract being made. *Held*, that there was a substantial compliance with the statute requiring a certifi-

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cate to be obtained before the commencement of the school, and that, in any view of the case, the certificate would be sufficient for the school kept after, if not for the same day that it was given.

The fact that scholars and parents are dissatisfied with a school teacher is no sufficient cause for dismissing him before the expiration of the time for which he has been employed. Evidence to show such dissatisfaction is, therefore, inadmissible in an action to recover damages on account of such a dismissal. To justify it, actual incapacity or unfaithfulness must be shown.

ASSUMPSIT to recover for services rendered in teaching school for the defendants, and damages for not being permitted to teach for the time contracted for. Plea, the general issue; trial by jury, December Term, 1855,—UNDERWOOD, J., presiding.

The plaintiff, to support the issue on his part, gave evidence tending to show that, in the fall of 1853, Erastus Woodward, prudential committee of the defendant district, made a contract with the plaintiff to teach the defendants' school three and a half months, the then ensuing winter, at \$18 per month; that the plaintiff commenced the school the 21st day of November, 1853, and continued the same about seven weeks, when, without fault on his part, and without cause, said Woodward dismissed him.

The defendant, for the purpose of showing good cause for the dismissal, offered to prove, among other things, that the plaintiff's scholars were disaffected with the plaintiff's school, and threatened to leave it; that on the day the plaintiff was dismissed, there was an informal meeting of the inhabitants and most of the legal voters of the district, said Woodward being present, and that said meeting unanimously voted that the plaintiff should be dismissed from the school; to which the plaintiff objected, and the court excluded the same.

The defendants called one Alexander as a witness, whose son attended the plaintiff's school two or three days, when witness permitted his son to leave the school, on his son's complaining about it, and witness refused to Woodward to have his son go back; and the defendants proposed to show, by the witness, the reasons why he would not let his son go back to the plaintiff's school; to this the plaintiff objected, the defendants not proposing to show that the plaintiff was present, or that the witness' reasons were derived from any knowledge of the plaintiff's conduct, and the court excluded it.

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The defendants further offered to prove, by said Woodward, that theretofore, in previous years, the school in said district had been good, and that the scholars behaved well. To this the plaintiff objected, and the court excluded it.

The defendants' testimony tended to show that the plaintiff, in managing his school, was cross, crusty and severe in his manner, that he punished the scholars excessively, and neglected the recitations of some of his pupils; that the plaintiff was ill-natured, morose and coarse in his language and manners. The plaintiff put in evidence tending to contradict this.

It appeared that on the morning of the 21st of November, before the plaintiff commenced his school, the plaintiff and his brother went to the superintendent to be examined, that the superintendent examined the plaintiff's brother, and told the plaintiff to call in the evening and he would then examine him, and that it would be just as well for him; that the plaintiff did so, and was not examined till evening, when, on examination, the superintendent gave him the usual certificate.

The plaintiff's testimony tended to show that Woodward treated and recognized the plaintiff as the teacher of the school, after the plaintiff had obtained his certificate, but it did not appear that Woodward ever knew anything about the plaintiff's having or not having a certificate at any time, or of his attempting to obtain one; and there was no evidence of any express new bargain between the plaintiff and said Woodward after the plaintiff obtained his certificate.

The defendant requested the court to charge the jury that, as the plaintiff did not obtain his certificate until after he commenced his school, he could not recover. The plaintiff contended that the certificate obtained, under the circumstances, would relate back to the time of the contract, and entitle the plaintiff to recover from the beginning, and so requested the court to charge. The court refused so to charge, but told the jury, among other things not excepted to, that the plaintiff could recover nothing for the first day's teaching, but if they found that, after the plaintiff obtained his certificate, Woodward recognized the plaintiff as the teacher, and treated him as such, and as going on under the original contract, and that nothing else was said or done, and no new express con-

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tract made, and no objection made to the plaintiff's continuing the school, it might be regarded as a confirmation of the original contract, and the plaintiff regarded as having commenced his term, under the contract, on the 22d of November, and he be entitled to recover from that time, provided the jury found the plaintiff was dismissed without sufficient cause; and, to the instruction given to the jury on this point, no exception was taken. To the refusal of the court to charge as requested, both the plaintiff and defendants excepted, and to the exclusion of the testimony offered by them and rejected, the defendants excepted. Verdict for the plaintiff.

Converse & Barrett for the defendants.

Washburn & Marsh for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. I. The question in regard to the certificate of qualifications of the teacher is fundamental to the action. The statute undoubtedly requires the certificate to be cotemporary with the opening of the school. In this case, it bears date the same day the school was opened, and the law will, upon the face of the paper, presume it existed at the time the school was opened, as in such case, events bearing the same date, will be presumed to have occurred in the order in which the law requires them to be transacted, according to the maxim, *ut res magis valeat*. And, ordinarily, the court will not take notice of a part of a day, regarding it as a mere point. But, for many purposes, courts go into proof of very nice distinctions, in regard to time. As where there are conflicting rights, as to priority, between creditors and purchasers, or heirs. We are rather inclined to think that if it were necessary to uphold the contract, in the present case, to refer the certificate to the earliest point of time in the day, as the plaintiff obviously did comply with the substantial requisites of the statute, in obtaining the certificate the same day he began his school, that we ought to do so.

It seems to us, also, if we were to look into the proof, in the present case, that the plaintiff having done all in his power to obtain his certificate, in the early part of the day, and having, by the

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superintendent, who has specially the control of the subject of the qualifications of teachers, been referred to the latter part of the day for his examination, with the assurance "that it would be just as well for him," that we should so construe the transaction as to give it the same operation the superintendent intended that it should have, *i. e.*, from the time of the application. This is a familiar principle in the law; and, although a fiction, in regard to the order of events, often is resorted to for purposes of justice and convenience, and will never be permitted to operate where injustice would be its consequence, this seems to us a proper case enough for its application.

But, in any view of this case, as it seems to us, the contract became binding upon the obtaining of the certificate. The contract, as stated in the case, was to teach the school the ensuing winter, three and a half months, no time being specified for the beginning. The statute is, that any contract for teaching school shall be null and void, if the teacher fails to obtain a certificate of qualifications before the commencement of the school. We do not think the party having taught one day before he obtained his certificate, even if it had been dated in the present case the 22d day of November, and he had then continued to teach, that the contract would have been thereby avoided. It might require the performance of the full term, after the certificate was given. But it would certainly be a very rigid and unreasonable construction, under the circumstances of the present case, to make the fact of opening the school a few hours before the actual giving of the certificate, operate a forfeiture of the contract. It would be, in our opinion, what the statute did not contemplate.

II. In regard to the testimony rejected, its relevancy depends something upon the view we take of the grounds for the removal of teachers. The statute is, that the prudential committee may remove teachers "when necessary." Men's views differ very much upon the subject, according to their notions of the qualifications of teachers. The qualifications of teachers, not only as to their competency to teach, but also their moral character and capacity for the government of schools, is referred, in the first instance, certainly, to the determination of the town superintendents. They are expressly required to examine into their qualifications upon all these

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points, before giving them certificates, and it would seem that their determination should be regarded as very decisive evidence in regard to the possession of the requisite qualifications. I would not, perhaps, be prepared to admit that it was absolutely conclusive upon the district, or prudential committee. For the qualifications for government are difficult of estimation, and this is the point upon which the difficulty arose in the present case, and upon which it is most likely to occur.

The testimony excluded was chiefly that which tended to show dissatisfaction among the scholars and inhabitants of the district. The other evidence rejected was in regard to the good conduct of the school, before that time, which was offered to add weight to the fact of the complaints. Alexander's reason for keeping his child out of school, after a few days, as it is said he did not know any fact in regard to the manner of governing the school, could only be based upon hearsay and complaint.

The legal force of this evidence will depend upon two considerations.

1. Whether it is the best evidence of which the case admits.

2. Whether the laws of nature, or the course of human experience, shows any necessary or uniform connection between complaints, in such cases, and incompetency or misconduct in teachers.

In regard to this latter part, it seems to us impossible to say that any such connection exists. It will not be pretended there is any necessary connection. And the course of experience shows that, in all the relations of life, where it becomes necessary to exercise control over others, complaints will often arise without any just cause. A mere accident will sometimes set a whole school district in a blaze about the idlest subject imaginable, and it is often no easy matter to restore quiet and good understanding. Under such circumstances, it would no doubt be the part of the highest wisdom in a teacher, after having made a fair trial, and failed to give even tolerable satisfaction, to retire, and acquiesce in a necessity above his control, although existing without his fault. But if he choose to persist in his right, we do not perceive how he can be deprived of his contract to go on with the school, without a claim to damage for the loss he thereby sustains, unless by showing his incompetency or unfaithfulness.

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We are unable to see how this clamor could justify the defendants, by their committee, in absolutely removing the plaintiff from his school, unless upon showing that the complaints were well founded; or how he is responsible for the complaints, unless well founded. The very highest order of administrative talent in schools, and every where, is pretty sure to go along quietly. But every one does not possess the gift to govern a school acceptably, in all times and all places, and under all circumstances, for there is no government more trying, under an unfavorable complication of influences. That of administering a great empire is scarcely more trying, either to patience or skill. And it is not reasonable to require this rare combination of administrative ability, in every man, who undertakes to teach a district school, for less wages, it may be, and often is, than he would command in the most ordinary agricultural or mechanical employments.

And, among men of medium ability, and that is all which a contract of this kind requires for its performance, among such teachers, as a general thing, perhaps, very often, certainly, the most artful and intriguing, or indulgent, and who care little about the result of their service, if they only get through and get pay, are about as likely, perhaps, to give a sort of negative satisfaction to the pupils, and to the parents, often, as those who sincerely and studiously labor to control the school, and to teach the pupils thoroughly, and govern them with reasonable strictness. So that knowing of complaints in school, is no certain proof of fault in the teacher. We must still inquire further. We are, in fact, no nearer the ultimate truth of the matter.

If there is great dissatisfaction, there is more commonly some fault upon both sides, but it is a mere conjecture where the first fault, or the chief fault lies, and results of this loose and uncertain character are not to be resorted to for the purpose of establishing their causes, and especially when the causes are susceptible of the clearest proof. If a cause is latent and involved in mystery and uncertainty, we often resort to very remote circumstances for the purpose of detecting some avenue to such hidden cause.

2. In the present case, the very fact to be found, the manner in which the plaintiff did perform his undertaking, was open to proof

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from the whole school. The parents, too, when those complaints came to their knowledge, might have gone and seen for themselves, and, if they did not, they should not now require the court to condemn the plaintiff upon the imperfect and unsatisfactory ground upon which they were content to rely. They might act upon hearsay, but courts have to require proof.

This general dissatisfaction with a teacher, or any one called to exercise authority, is certainly of great importance to be considered, in employing one a second time, but it seems to us no sufficient ground for removal. The considerations which should operate in the selection of a teacher, or in removal from that office, are certainly very difficult. One is a question of discretion and expediency, merely; and the other, one of mere right. A man has no right to expect, and, I think, ought not desire to continue in such a place, against the wishes of any considerable number of those whom he is called to control, beyond the time of his actual contract, even if he could secure a renewal of it. But upon the question of yielding to mere clamor, and actually resigning his post, men are so constituted that they will act differently, and it is not always useful to give too much countenance to the fault-finding spirit. And, at all events, the plaintiff had, in our judgment, by his contract, and the approval of the town superintendent as to his qualifications, acquired the right to insist upon performing his contract, unless he were shown to be, in fact, incompetent or unfaithful; and, if he was removed upon any other ground, he was entitled to damages, according to the circumstances of the removal. This not being made a question, we say no more in regard to it.

In regard to the argument that the defendants might show the effect of the plaintiff's treatment of his scholars, in being cross, crusty and severe, it is obvious that the defendants would have all the benefit of this, in showing, as they might, the immediate effect upon the scholars, at the time. And, the resort to out-of-door declarations of the scholars, or parents, could be of no avail in showing the extent of the plaintiff's moroseness; or the complaints might proceed from other causes. And, even if the complaint was of the plaintiff's ill-temper, it would be but hearsay proof that such was the fact, as men and children often complain of one thing, when

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they are, in fact, moved to make complaint from a very different cause, and one which they might hesitate to avow, unless compelled to testify, and this they should be required to do, rather than to allow proof of their mere declarations out of court.

We think the judgment must be affirmed.

THE STATE OF VERMONT *v.* THE VERMONT CENTRAL RAIL-
ROAD COMPANY.

Information against a railroad company for neglect to ring bell &c.

In an information against a railroad company, a description of the respondent by name, and as "a corporation existing under and by virtue of the laws of this state, duly organized and doing business," is a sufficient allegation that it is a corporation *in esse*.

The time and place, when and where their existence commenced, need not be averred.

The information (*q. v.*) in the present case, against the respondents, (a railroad corporation) for unreasonably neglecting to ring a bell, or blow a steam whistle when crossing a public road with their engines, &c.; *held* sufficient.

INFORMATION by the state's attorney against the respondents for unreasonably neglecting to ring a bell, or blow a steam whistle while crossing with their locomotives and cars, a public road in the village of Windsor, to which information the respondents demurred. The county court, December Term, 1855,—UNDERWOOD, J., presiding,—overruled the demurrer, and adjudged the information sufficient, to which the respondents excepted.

The information charged "that the Vermont Central Railroad Company, a corporation existing under and by virtue of the laws of this state, duly organized and doing business, now and for a long time hitherto, to wit five years, having, owning and using a railroad, and thereon running and using locomotive engines and cars during all the time aforesaid, which said railroad in part has, during all the time aforesaid been situated, located, and passing in and through the village of Windsor, in the town of Windsor, in said

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county of Windsor, and crossed a public road in said village of Windsor, known and called Everett street, on the same grade as and with said street, heretofore to wit, on the twenty-first day of July, in the year of our Lord eighteen hundred and fifty-four, run and caused to be run a locomotive engine, and cars thereto attached, with great speed, to wit, at the rate of thirty miles per hour, along and upon said railroad within the said village of Windsor, and therewith then and there, at the speed aforesaid, crossed the said Everett street, on the grade aforesaid, and the said Vermont Central Railroad Company did not, while running and causing to be run said locomotive engine and cars along and upon said railroad, within said village of Windsor, and therewith crossing said Everett street as last aforesaid, ring or cause to be rung any bell upon said locomotive engine within the distance of eighty rods of the place where the said railroad then and there crossed said street as last aforesaid, nor keep or cause to be kept said bell ringing until said locomotive engine had then and there crossed said street, as last aforesaid, nor was the steam-whistle upon or connected with said locomotive engine blown within eighty rods of said place where said railroad crossed said Everett street, while said locomotive engine and cars were then and there running along and upon said railroad, and crossing said Everett street in the manner last aforesaid. And so in manner last aforesaid the Vermont Central Railroad Company, on the said twenty-first day of July, A. D. 1854, to wit, at Windsor aforesaid, unreasonably neglected to ring a bell upon said locomotive engine, and unreasonably neglected to blow a steam-whistle upon said locomotive engine within the distance of eighty rods of the place where said railroad then and there crossed said Everett street, and until said locomotive engine had then and there crossed said street, contrary to the form of the statute in such case provided, and against the peace and dignity of the state."

Peck & Colby for the respondents.

The information is fatally defective. The company have no legal existence except by force of a charter, and organization under it; and these facts must be alleged. It is not enough to describe it as a legally existing corporation; *State v. Vt. C. R. Co.*; Wash. Sup. C. Circuit T. 1853; *State v. Mead*, 27 Vt. 722.

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In the case first named, it being an indictment for neglecting to put up sign-boards at crossings, the description of the respondent was "a corporation duly chartered and incorporated by the legislature of the state of Vermont at their session holden, &c; and "afterwards on the day of in pursuance of their "charter aforesaid, located their said railroad, &c." But the indictment was held bad, for omitting to allege an acceptance of the charter.

No time is stated *when* the corporation became such. Time and place should be *alleged* with certainty of every material fact; Archibold Crim. Plead. 37, 38.

It is not alleged that the train was *approaching* the crossing when they omitted to ring the bell.

No offence is committed by not ringing the bell or blowing the steam whistle; but the offence consists in *unreasonably* neglecting and refusing to do so. The information contains no allegation that the respondents *unreasonably* neglected, &c. This omission is fatal.

The allegation is, "and the Vt. Cent. R. Co. did not ring, or cause to be rung a bell, &c. Nor was any steam whistle blown, &c."

"Nor was the steam whistle blown," is no averment that the company did *unreasonably* neglect and refuse to blow a steam whistle.

"And so in manner aforesaid, the said company *unreasonably* neglected to ring a bell, &c; and *unreasonably* neglected to blow a steam whistle," is not an *averment*, but a conclusion drawn from the previous statements.

If these words constitute an averment, the information is bad, because the statute does not impose the duty of ringing the bell, and blowing the whistle at one and the same time. The allegation is that the company did not do *both*, *non constat* but one or the other was done, which would answer the statute.

J. Barrett, state's attorney, for the prosecution.

The opinion of the court was delivered by

BENNETT, J. The indictment in this case is predicated upon the *neglect* of the company to ring their bell or blow their whistle,

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as required by the general railroad law, when about to pass a public highway.

It is objected, that the existence of the corporation is not sufficiently alleged in the information; but we think otherwise. They are designated as being "The Vermont Central Railroad Company, a corporation existing under and by force of the laws of this state, duly organized and doing business." The name of the corporation is given, and they are alleged to be *in esse*, "existing under and by virtue of the laws of this state, duly organized and doing business," &c. In the case decided by this court in Washington county, 1853, in which the indictment was held bad, the court considered that there was no sufficient averment that the railroad company was a corporation *in esse*. The allegation there was "a corporation duly chartered and incorporated by the legislature of this state." There was no allegation that the company had ever accepted their charter, or had organized under it. In that case it could not be claimed that there was a direct averment that the corporation was *in esse*. At most, it could only be claimed that it was argumentatively alleged to be a corporation *in esse*.

But a company may be chartered and incorporated by act of the legislature, and yet not be organized, or so far *in esse*, as to subject them to indictment for neglect of a duty imposed upon them by statute. It was no more necessary that the information should state the time and place, and when and where, the defendants became a corporation, than it would be to state the time and the place of the birth of a natural person. A distinct and positive averment of the existence of an artificial person, is usually all that is required.

We think the offence is well charged in the information. The statute requires a bell to be rung, or the whistle blown at the distance of at least eighty rods from the crossing, and the ringing continued until the road or street shall be passed; and the offence consists in an unreasonable neglect or refusal to comply with the requirements of the statute. The allegation is sufficiently positive that the omission or refusal to ring the bell, or blow the whistle, was when the engine was running towards the crossing, and not when passing from it. Though the information does not allege, in the first instance, that the company unreasonably neglected, &c; yet

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it does so allege in the concluding part of the information. The duty to ring the bell or blow the whistle, are well charged in the indictment in the disjunctive. The company were not required to do both ; and though, in the breach of this duty, it is alleged the company unreasonably neglected to ring the bell, and unreasonably neglected to blow the whistle, yet this will not vitiate the information. The proof, on trial, would regulate this matter. If we treat this as an assignment in the breach, that the company did not do both, as I think we should ; yet if, upon trial, it should be found that they had done either the one or the other, a verdict should be directed for the defendants. The information then is adjudged sufficient.

The case is continued for the assessment of the fine.

THE TOWN OF WOODSTOCK v. LEWIS F. GALLUP.*Highways. Certiorari and mandamus. Practice.*

Ornament, and the improvement of grounds about a public building, may be taken into consideration and regarded in connection with the convenience and necessity of a proposed highway ; but they do not alone constitute a sufficient basis for establishing it.

Upon a report of commissioners in favor of laying a highway, if the county court, do not proceed to consider and determine the case upon its merits, the aggrieved party may, upon a proper application, have a remedy in the supreme court.

In an application therefor, a general prayer for such remedy as the court shall deem proper is all that is necessary.

The proper office of, and proceeding upon writs of certiorari and mandamus in the nature of a procedendo considered.

PETITION FOR A CERTIORARI. From the petition and proceedings in the county court, referred to, it appeared that the selectmen of the town of Woodstock laid out a highway through a house lot, and certain buildings of the petitionee, adjacent to the court house and town hall in said Woodstock, from which he ap-

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pealed to the county court. The county court appointed commissioners who reported that the public good, and the necessity and convenience of the public and of individuals required said highway and that they accordingly laid and established it; and, at the request of the appellant, they made an additional report in which they stated that they established the road upon the ground of a general public necessity and convenience, which they considered almost indispensable for the use of the court house and the town hall, and for a proper ingress and egress to and from them and the grounds about them, taking into account, in part "*the looks*," as well as the convenience and necessity, "considering the public have a right to be accommodated in all these particulars, to a reasonable extent," but that "for the purpose of *embellishment* alone or mainly" they should not have established the road. The county court decided, strictly as matter of law, that they had no power to establish the highway reported, upon the ground that embellishment or looks in any part entering into the grounds of laying a road, was illegal; and therefore set aside the highway laid by the selectmen.

The petition to the supreme court set forth the above facts, either by direct statement, or by reference to the proceedings of the county court, and averred that the highway as laid by the selectmen was required by the public good; and that the judgment of the county court was irregular and void, for that the said court had power, as matter of law, upon the matters stated in the report of the said commissioners, to establish said highway, and that by said decision and judgment the said town of Woodstock was injured and aggrieved; and prayed that a writ of *certiorari* might issue that the files and proceedings of said county court might be certified to the supreme court, to the end that they might be inspected, "and such further be done in the premises as of right, and according to the laws of the land, shall seem meet."

P. T. Washburn for the petitioners.

The decision of the county court upon the question of law determined by them was erroneous.

The commissioners fully adjudicated and reported that the public good and the necessity and convenience of individuals required that the highway should be laid. That the result of constructing

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it would be an improvement of the looks of the public buildings adjacent, is a mere incident, and should not be allowed to deprive the public of its use. *Proprietors of 3d Turnp. v. Champrey*, 2 N. H. 199. *Parks v. Boston*, 8 Pick. 227.

The decision of the county court should be reversed, and the case be remanded, for the court to proceed and determine the questions remaining in the case. 1 U. S. Dig. 501.

Tracy and *E. Hutchinson* for the petitionees.

Even if the county court erred in the grounds of their decision, a *certiorari* should not, (in the exercise of a sound discretion,) be granted. It is a matter of too small importance. *Paine v. Leicester*, 22 Vt. 44. If granted, this court could make no disposition of the case, but to quash the proceedings below, which would do greater injustice than to let them stand. *Royalton v. Fox*, 5 Vt. 459, 460. *West River Bridge v. Dix et al.*, 16 Vt. 446. 5 Dav. Ab. Title *Certiorari*, Ch. 138, p. 85, Art. 1, § 1; p. 86, § 7; p. 90, Art. 3, § 7, 8; p. 92, Art. 4, § 1; p. 93, Art. 4, § 8. This court must see from the whole record that no injustice is done, and the writ should therefore be denied. *Myers et al. v. Pownal*, 16 Vt. 417.

But there was no error in law. Const. of Vt. part 1, Art. 1, 2 and 7. Comp. Stat. Ch. 22, p. 161, § 1, 2, 5, (p. 166) § 32, 33. *Commonwealth v. Cambridge*, 7 Mass. 167, (opn. of PARSONS, CH. J.) *Keene v. Stetson*, 5 Pick. 492-4-5. *Commonwealth v. Savin et al.*, 2 Pick. 547. *Paine v. Leicester*, 22 Vt. 49, (opn. of REDFIELD, CH. J.) *Beach v. Haynes*, 12 Vt. 15.

The opinion of the court was delivered by

REDFIELD, CH. J. This was an original proceeding in this court by way of petition served upon the opposite party, by process in the usual mode, setting forth, in substance, that a petition was pending in the county court, for the purpose of laying out a highway, in the town of Woodstock, through the defendant's land, and that the report of the commissioners, establishing such highway, having been filed in that court, it was by such court decided, as matter of law, that they had no power to accept the report and establish the highway, on account of defects apparent on the face

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of the report, and that they rendered judgment thereon against the establishment of the highway, and dismissed the petition on that sole ground, and as a pure question of law. The petition alleged that there was no such legal defect in the report, and that the petitioners are entitled to have the highway established, and praying this court to grant a writ of *certiorari*, requiring the county court to send the record of that case into this court, and to reverse their judgment, and require the county court to proceed and try the case upon its merits. The defendant objects to the form of the process prayed for; and also that the judgment of the county court was the proper legal judgment in the case.

In regard to the merits of the case, it seems to us to be governed by that of *Rand v. Townsend*, 26 Vt. 670, if the ground upon which the county court proceeded is not sound in law. And it seems to us that it is not. If it appeared, upon the face of the report, that the prevailing ground with the commissioners, in establishing the highway, was that of ornament and improvement of the court-house grounds, we should regard it as an insufficient basis upon which to lay the highway, and as equivalent to a report against its being laid. And in that case we do not think it would be competent for the county court to receive evidence, and establish the highway over the heads of the commissioners. I have never known it attempted, in any court in the state, to establish the laying out of a highway by independent proof of its fitness or necessity, when the commissioners, to whom the subject is required to be referred, report against laying it.

But in the present case, we understand the prevailing motive and ground of action with the commissioners, in laying the road, was the public convenience and private necessity, and the matter of ornament merely incidental and accessary. In that view, and we think it the only fair and just view, when the whole report is taken into the account, it does not seem to us objectionable. The question of establishing the highway, being *prima facie* made out by the report, was open to be contested before the court, upon its merits, and should have been determined by them. And, as we held in *Rand v. Townsend*, the party is, in some form, upon proper application, entitled to have a remedy in this court.

In regard to the form of the remedy, and especially the particu-

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lar remedy prayed for in the petition, it is, perhaps, not very important by what particular name we call it. The general prayer for such remedy as the court shall deem meet and proper is all that is required, and after naming one remedy, as in the present petition, *certiorari*, the addition of the general prayer for such relief as the party may be entitled to, is all that is requisite. And that amendment being matter of form merely, may now be made, and the court will award the proper writ.

But since the subject is now properly before the court, as to the proper office of these different writs, it is not improper to examine it somewhat at length, as the subject has not often been much considered by the court. The statute, chap. 28, § 5, gives this court power to issue writs of "error, *certiorari*, *mandamus*, prohibition and *quo warranto*, and all other writs and processes to courts of inferior jurisdiction, to corporations and individuals, that shall be necessary to the furtherance of justice," &c.

The authority thus conferred has been regarded as co-extensive with the authority, in this respect, exercised by the court of King's Bench, in England, so far as applicable to our condition and wants. And it has generally been the purpose of this court to adopt, substantially, the forms used in the King's Bench. But the organization and course of proceeding, in the superior courts, in reference to actions pending in the inferior courts, is essentially different in England from what it is in this state. As this court is now constituted, we have no general original jurisdiction, either civil or criminal, and no jury trials. And it has never been the practice to bring cases from the inferior courts into this court for trial, which is the principal use of the writ of *certiorari*, in England, where it is more generally confined to criminal proceedings; 4 Black. Com. 320-321; 5 Petersdorff's Ab. 114, [149]; 1 Bac. Ab. Tit. *Certiorari*; F. N. B. 245. But the cases reported under the title *Certiorari* in 5 Pet. Ab. 149, *et seq.*, shows that the *certiorari* is the substitute for a writ of error, in cases where the proceedings are not according to the course of the common law, and where, by consequence, no writ of error lies; and it extends to such proceedings as laying highways, and other judicial proceedings and matters, in the sessions, and other inferior tribunals. But in our practice, we never, upon writs of error, remand a case which is brought into

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this court and judgment reversed, where further proceedings are required, unless an issue of fact, proper to be tried by the jury, arises, but the case, in all other respects, is finished in this court. In analogy to this, we have never, that I am aware of, brought up a sessions matter into this court, until it was finished in the inferior court, by a decision upon its merits; *Rand v. Townshend*, *supra*; *Paine v. Leicester*, 22 Vt. 44.

It seems to us that the more appropriate remedy in cases like the present, where the inferior court disposes of the matters upon some incidental question, and decline to hear the case upon its merits, is a writ of *mandamus*, in the nature of a *procedendo*, as was held by the supreme court of the United States, in *Livingston v. Dorgenois*, 7 Cranch 577, 2 Curtis 677; and as was virtually done, in *ex parte*, Crane, 5 Pet. 190, where a mandamus was issued to the judge of the circuit court, in the district of New York, requiring him to sign a bill of exceptions. The writ of mandamus is the supplementary remedy, so to speak, where the party has a clear right, and no other appropriate redress, to prevent a failure of justice; 3 Black. Com. 110; 12 Pet. Ab. 438, (309.) It is the absence of a specific legal remedy, which gives the court jurisdiction; 2 Sel. N. P., Title, Mandamus. But the party must have a specific legal right; *Rex v. Barker*, 3 Burrow 1263; *ELLENBOROUGH*, CH. J., 8 East 219. The remedy extends to the control of all inferior tribunals, corporations, public officers, and even private persons, in some cases; but more generally the English court of King's Bench declines to interfere, by mandamus, to require a specific performance of a contract, where no public right is concerned; Lord MANSFIELD, in *King v. Barker*, 3 Burrow 1261-1270; Angell & Ames on Corp. 761; *The King v. The Mayor of Colchester*, 2 Term 260; *The King v. Corporation of Bedford Lead*, 6 East 356. There is almost no end to the cases upon this subject. They will be found digested, under the title Mandamus, in Petersdorff's Ab. and Bacon's Ab.

The *procedendo* seems to be only a particular form of the mandamus, and often to accompany the *certiorari*, and indeed always, perhaps, where the case is remanded for further proceedings in the inferior court. So that in the present case, if the *certiorari* had issued, and the record been actually brought into this court, all we

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could have done, would be, to reverse the judgment of the county court, and either hear it in this court, upon the merits, or remit it to the county court, with a writ of mandamus, in the nature of a *procedendo*, to hear the case and determine it upon its merits; 14 Petersd. Ab. 43, (32); 3 Black. Com. 109.

The *procedendo* is always accorded where the case is more proper to be tried in the inferior court; *Pope v. Vaux & Wife*, 2 Black. 1060. But the mandamus and *procedendo* is not to require the inferior court to render any particular judgment, but to proceed and give judgment, notwithstanding some alleged excuse. *Ex parte Hoyt*, 13 Pet. 279. Nor will a mandamus be accorded where the party has an appeal to the same court where the mandamus is asked. *Ex parte Whitney*, 19 Pet. 404. And in this case, we prefer this mode of redress to that of *certiorari*, only because we can, in this mode, accomplish all that is desired, without bringing the case here before it is finished in the inferior court.

The case of *Walker v. The London and Blackwell Railway*, 3 Q. B. 744, is a case almost precisely in point. The sheriff was required to hold inquisition upon petitions for land damages against railways. Upon the trial of the plaintiff's case, the sheriff directed the jury to find a verdict for the defendants, on the ground that the plaintiff was not entitled to compel the company to purchase his property. The Queen's Bench, on application for a peremptory mandamus, decided that the writ must issue, requiring the sheriff to proceed and assess the damages, disregarding his former judgment and the verdict of the jury. The form of the writ there issued was a mandamus, in the nature of a *procedendo*, as in the present case. But very likely the same thing might only be done by mandamus, in regard to those tribunals to which the superior court had power to issue the writ of *certiorari*. For if that were taken away, by statute, it would be regarded as an evasion to accomplish the same thing, more directly, by a mandamus; *Rex v. Justices of Yorkshire*, 1 Adol. & El. 563; see *In re Edmundson*, 24 Eng. R. 169.

The petitioners having amended the prayer of the petition, by adding thereto, "or mandamus, or other appropriate remedy, in the discretion of the court," the order is made.

That a writ of *mandamus*, in the nature of a *procedendo*, do

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issue to the county court, in the county of Windsor, requiring them to proceed and hear, try and determine the case there pending between the parties aforesaid, as described in the petition to this court, upon its merits, and render judgment thereon, wholly disregarding their former judgment given in the case and complained of in the petition here pending, and that no costs, in this court, be taxed in favor of either party.

THE STATE OF VERMONT *ex relations* SOLON DANFORTH,
LUCIUS L. TILDEN, DUDLEY C. DENNISON, GEORGE S.
HATCH AND JOHN B. HUTCHINSON *v.* AUGUSTUS P. HUN-
TON, LOREN GRISWOLD, MERRICK GAY, GEORGE FRANCIS
AND ROLLIN RICHMOND.

*Practice. Right to go forward. Proceedings upon quo war-
ranto. Right of foreign bank stockholder to vote at election
of directors.*

Upon an information for a writ of *quo warranto* charging the defendants with having usurped offices which they are in possession of, the presumption is that they are regularly elected, and entitled to hold them until the contrary is shown. The applicants, therefore, being bound to make a case against them, should go forward in the proof and in the argument.

Quære, whether, upon an information in the nature of a *quo warranto*, the prosecutor can, if objection is made, proceed merely by obtaining a rule to show cause, &c., or whether he should not follow the English practice, and proceed either by *venire facias* and *distringas*, or by subpoena and attachment.

The stock of a bank in this state, which is owned by a person residing out of it, cannot be voted on at the election of directors, though it stands, upon the books of the bank, in the names of inhabitants of this state, to whom it has been transferred for the purpose of enabling them to vote upon it.

Question of fact as to the character, in this respect, of a majority of the votes which were cast against the defendants, in the election of directors of the White River Bank, examined and determined.

INFORMATION for a writ of *quo warranto*, charging the defendants with having usurped the office of directors of the Bank of White River, at Bethel, without any legal election, &c.

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A question was made, (after the reading of the information, and rule *nisi* requiring the defendants to show cause why such a writ should not issue, and the defendants' answer, upon oath, to the several charges in the information,) which party was entitled to the open and close, in the proof and the argument:

BY THE COURT. The form of the issue, requiring the defendants to show cause, would seem to indicate, in form, that the defendants would be required to go forward in the case. But it seems to us that the form of the issue in the case does not correctly define the true position of the parties, in regard to the presumption of right. The defendants are in possession of the office in question, and should be presumed regularly elected and entitled to hold until the contrary be shown. The plaintiffs, then, are bound to make a case against them, and they should go forward in the proof and in the argument.

Several affidavits, taken with notice, were then read, both upon the part of the relators and of the defendants, the substance and purport of which, so far as they related to any of the questions decided, are sufficiently set forth in the opinion of the court, which also sufficiently sets forth the nature of the claims made by the respective parties, and the grounds upon which they were based.

J. Barrett, state's attorney, *J. Converse* and *A. Tracy* for the relators.

Washburn & Marsh, *C. Coolidge* and *W. M. Pingrey* for the defendants.

The opinion of the court was delivered by

BENNETT, J. The defendants are brought before this court upon a rule to show cause, &c., which was granted by the supreme court at their regular session in Bennington county; and no question has been raised in regard to the regularity of the proceeding, although it seems that in England, upon an information in the nature of a *quo warranto*, the attorney-general must proceed either by *venire facias* and *distringas*, or *subpœna* and *attachment*; and, in *The People v. Richardson*, 4 Cowen 100, it was held, in the state of New York, there was no necessity of departing from the

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English practice ; yet we are not disposed, as no question has been raised by the defendants, to inquire whether, as matter of practice, our course of proceeding should regularly conform to the English practice, or whether we should be allowed to introduce a practice of our own, differing from the English practice. The defendants do not claim but what this is a proper proceeding to try their right, but their defense is put upon the ground that they were legally elected directors of said bank, and have a right to hold the office of directors, and discharge the duties thereto belonging. No question has been raised as to the legality of the votes cast for the defendants, but the point is, did they have a majority of the legal votes cast at the election? The general banking law of this state, Comp. Stat. p. 489, enacts that no stockholder *residing out of this state* shall, either personally or by proxy, vote in the meetings of the corporation. This provision shows a marked intention on the part of the legislature, that our banks should be controlled only by our citizens, and, probably, for wise purposes. A large majority of the votes were, in point of fact, cast for the relators, and the question is, as to the legality of the votes cast for them. It is an admitted fact that some short time before the meeting of the corporation, John J. Prentiss, a citizen of New Hampshire, advanced to Solon Danforth and others, about the sum of thirty-eight thousand dollars in the whole, which was to be expended in the purchase of stock in the White River Bank, and the money was so expended, and conveyances of the stock were taken to citizens of this state, and, by them parceled out to other citizens, mostly in four shares to each one, the banking law giving to a stockholder of but four shares one vote on each share. The number of votes cast upon stock purchased by Skinner, Danforth and Lyman, with money furnished them by Prentiss, and by them evidently distributed to divers persons for the purpose of increasing the number of votes on the stock, was rising of five hundred. The first question is one of fact. Who was the real and substantial owner of this stock? Did it, in fact, belong to Prentiss, a citizen and resident of New Hampshire? Of this, we can have no reasonable doubt. The money was furnished by Prentiss, with which the stock was to be bought, and we think that the pretence that it belonged to any one else is altogether *colorable*.

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It was necessary, to carry out the object, to attempt to give the transaction the character of a loan, and hence we find that when Skinner, Danforth and Lyman received the money of Prentiss, they gave to him their receipt for it, by which they agreed "to account for the money, in stock in the White River Bank, or return the same, on demand." This receipt, in form, gives to Skinner, Danforth and Lyman, the option to account for the money in stock, and we are satisfied, from the whole evidence in the case, that this stock was to be purchased in trust for the benefit of Prentiss, and if not purchased, the money was to be returned to him. The sum advanced was a large one, and it is not usual that so large a sum should be loaned, and nothing said about security, and no price is stipulated at which the stock was to be received. Skinner, in his testimony, admits that Prentiss was to have the stock, if a change in the directors of the bank was effected; and Danforth admits that Prentiss said to them he should like to make the investment *in bank stock*, and that, if the directors were changed, the investment would be a good one, in that bank.

It is evident that Prentiss manifested all the interest of a party in the operation, was counseled by Skinner, Danforth and Lyman, in regard to who should be elected directors, and a ticket was settled upon, which was satisfactory to Prentiss: and the very manner in which the whole business has been transacted, shows that it must have been upon a trust, expressed or implied. No real transaction to so large an amount, among business men, could have been left to so much uncertainty and implication. Prentiss advanced a sum, large enough to give him the major part of the stock, and no one, who has heard the testimony, can doubt but what it was his design to get the control of the bank; and, to effect this, Skinner, Danforth and Lyman, who were his agents, and seem to have lent themselves to aid him in his wishes, parceled out the stock to various persons, in lots of four shares to each, with a design to control the election of directors. That these pretended sales were all a sham, and not *bona fide*, no one can doubt a moment. Nothing has been paid by the pretended vendees, and nothing has been required to be paid by the vendors. The pretended contracts were the same in all cases.

If, then, this stock, which in fact belonged to Prentiss, had stood

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in his name, it was not stock which could be voted on; and shall it be said that the effect of the statute can be avoided, by having the stock conveyed to persons in this state, to hold it in trust for the use of Prentiss? To allow this, would be to allow a *fraud* upon the law to prevail, and this is never to be tolerated. Suppose two of our own citizens were to go into the state of New York to make a loan of money, for the sole purpose of securing upon the contract interest at the rate of 7 per cent, our courts would regard it as a Vermont transaction, to prevent a fraud upon the law.

The law is not to be outwitted by *cunning devices*. So in this case, the stock belonging, in fact, to Prentiss should not be allowed to be voted on, though conveyed to citizens of this state, in trust, and for the purpose of being voted on. Rejecting the votes, then, cast upon the Prentiss stock, no question is raised but what the defendants were duly elected directors, they having a majority of the legal votes. We think the relators have failed to make out a case, and the proceeding is dismissed, but without costs.

THE STATE OF VERMONT v. SAMUEL NUTT.

Conviction of being a common seller of intoxicating liquors a bar to a prosecution for all previous acts of selling. Jurisdiction of justice.

The conviction of a person for being a common seller of intoxicating liquor is a conclusive bar to a prosecution for single acts of sale previous to the filing of the complaint, upon which the conviction for being a common seller was had.

A complaint before a justice that the respondent "did become a common seller of, and at divers time sell, furnish or give away intoxicating liquor," &c., is to be treated as a complaint under the 5th section of the act of 1852, to prevent the traffic in intoxicating liquor; and upon such a complaint the justice is empowered, by the 18th section, to adjudge the respondent guilty of being a common seller, and impose the fine specified in the 9th section of said act.

INDICTMENT for a breach of the license law of 1852. Plea, not guilty; trial by jury, May Term, 1855,—UNDERWOOD, J., presiding.

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Upon the trial the respondent produced a copy of the record of a complaint by the grand juror of Hartford, dated November 1st, 1854, charging that the respondent, "on the 27th day of September, 1854, did become a common seller of, and at divers times, sell, furnish or give away intoxicating liquors without authority," &c., and of a conviction of the respondent thereon, before a justice of the peace, on the 6th day of November, 1854, of being a common seller; and it was conceded that the breaches of the law found by the grand jury, and presented in said indictment, were all prior to said conviction. The respondent contended that said prior conviction was a bar to the indictment, and requested the court so to instruct the jury; but the court declined so to do, and held said conviction only, *prima facie*, a bar, and so told the jury.

The state's attorney gave evidence tending to prove that the breaches of the law alleged in the indictment, were other and different from those for which said conviction was had.

The state's attorney gave evidence tending to show what sales and furnishing were contained and embraced in said former conviction; and the court instructed the jury that they should not convict the respondent of any breach of the law respecting which any testimony was given in the trial before the justice, but that their inquiries should be limited to other and different breaches.

The jury returned a verdict of guilty of fourteen offences; to all which decisions and instructions of the court to the jury, and their refusal to charge as requested, the respondent excepted.

Washburn & Marsh and *J. Converse* for the respondent.

In the case at bar, the respondent was complained of as a common seller, and found guilty as such, for the same time, covered by this indictment.

What constitutes the crime of being a common seller? How many offences did the magistrate, who tried the case, suffer himself to take cognizance of in predicating his judgment of guilty as a common seller? Was it five, or fifty, or more?

If his judgment was made up to convict the respondent of the crime of being a common seller from the evidence generally, that there was more or less of selling and furnishing upon that occasion, as it undoubtedly was, how can the state predicate and sustain a

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new indictment, upon the proof of a few isolated offences, that were not separately proved before the magistrate?

It was these same offences, together with others, of which the respondent was guilty, that constituted him a common seller, and made him liable to its penalty. How then is the court to single out the offences, and say for such ones, he is guilty as a common seller; and for other like offences committed on the same occasion, he is guilty of selling or furnishing, and may be indicted accordingly.

It seems to us that the only safe rule for the court to adopt is, to give to the prior conviction the full force of a complete bar to an indictment predicated upon offences committed during the same period of time, covered by the former conviction.

Such is the rule in all other criminal cases; why should it not be in this?

J. Barrett, state's attorney, for the prosecution.

In order to constitute a bar, the former conviction must be for the same offence as that sought to be prosecuted in the pending case; *State v. Ainsworth*, 11 Vt. 91; *State v. Smith*, 22 Vt. 74.

When the identity does not, *prima facie*, appear on the face of the record, the *onus* is on respondent of showing it. The question of identity rests in proof. Where the record, *prima facie*, shows identity, the government may meet it by counter proof. See cases cited *supra*.

It is of no importance, that under that form of prosecution, all the acts of sale by the respondent, that had then occurred, *might* have been proved.

The point is, what offences were proved; 1 Ch. C. L. 462; 1 Archbold 114 & n. 1, and all the books.

Another view seems to dispose of the subject. The former conviction, in order to bar a subsequent prosecution for the same offence must have been valid; and to this end the court in which it was had, must have had jurisdiction; 1 Arch. 113, n. 1; 112 text. 112-2 n, 112; 3 n.

The justice had no jurisdiction in the former prosecution of Nutt as a common seller.

Under the statute of 1852, as to intoxicating liquors, sec. 6, defines the jurisdiction, and limits it to offences under section 5.

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The prosecution was for an offence under section 9. The statute does not give justices jurisdiction of that offence, nor of a prosecution against a person in that character, nor does it define what a common seller is.

Section 18 provides various forms of complaints; near the close it provides that, under the foregoing complaints, every distinct act, &c., may be proved, and the court shall impose a fine for each offence; or if the number exceeds five, the respondent may be adjudged a common seller, and subjected to the penalties provided in section 9.

This only gives the magistrate a special discretionary power in a specific form of prosecution, and for purposes quite obvious.

The opinion of the court was delivered, at the circuit session in October, by

BENNETT J. At the December Term of the county court, 1854, the respondent was indicted by the grand jury of the county in divers counts, for selling intoxicating liquor without license. On the trial of the case before a traverse jury, upon the plea of not guilty, the respondent gave in evidence a record of his former conviction of being "a common seller;" and the case finds that it was conceded, on trial, that the breaches of the law found by the grand jury, and presented in said indictment, were all prior to said conviction; and, as the case has been argued, *prior* to the praying out the complaint, upon which the conviction was had, the complaint having been prayed out the first day of November, 1854, and the conviction and sentence of the court on the sixth. We shall dispose of the case upon the hypothesis assumed by the counsel on both sides; that is, upon the ground that all the offences found by the grand jury were *prior in time* to the praying out the complaint, upon which the conviction, as "a common seller," was had, which no doubt was the fact. No question was made below as to the admissibility of the record under the general issue; but the question as to its legal effect, accompanied with the admission made by the counsel for the state, was the point submitted; and their decision upon the point submitted, is what we are to revise. We think the court erred in holding that the matter given in evidence was but a *prima facie* defense to the prosecution.

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The complaint charged that the respondent did become "a common seller of, and at divers times did sell, furnish or give away intoxicating liquor, &c." It was evidently drawn under the 5th section of the act of 1852; and the conviction was for being "a common seller," by virtue of the 18th section of the same act. That section prescribes the form of a complaint under the different sections. The form under the 5th section, charges, "a selling, furnishing, or giving away, at divers times, intoxicating liquor, without authority, &c;" and at the close of the 18th section it is provided, that under a complaint under the 5th section, every distinct act of selling, furnishing, or giving away, may be proved, and the court may impose a fine for each offence; or if the number exceed five, the respondent may be adjudged "a common seller," and be subjected to the penalties provided in the 9th section in the case of a "common seller." The offence of "a common seller" consists in a frequent repetition of the act of selling without authority; and upon common principles, there must be such a continuation, or rather repetition of unlawful sales, as would prove the allegation, in the complaint, of being a common seller. The 18th section of the act of 1852, however, provides that any number of sales, exceeding five, may subject a person to be adjudged "a common seller." The offence of being "a common seller," is but one, and is an entire offence; and it may be necessary to prove all of the several and distinct acts of sale which the party has been guilty of, to make out the offence, or a less number may suffice; but we think if a respondent is charged with being "a common seller," and is convicted and sentenced for that offence, it must be a conclusive bar, up to the time the complaint is made, to any prosecution, grounded upon any one act of sale prior to that time, whether it was proved or attempted to be proved on the trial or not. The several sales are constituent parts of one offence, and one too, of a different character, when measured by the penalty, from that of a single act of sale.

It would be indeed strange, if the government, upon the ground they had proved six distinct acts of sale, could claim a conviction as "a common seller," and thereby increase the penalty from sixty to one hundred dollars, and still reserve in store other acts of sale to make each one the ground of a distinct prosecution and penalty. The fact is, if the government see fit to go for the offence of being

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"a common seller," and the respondent is adjudged guilty, it must, in a certain sense, be considered as a *merger* of all the distinct acts of sale, up to the filing of the complaint, and the respondent cannot be punished but for one offence. This is not like the case where the conviction, relied upon in bar, was for an individual act of sale. Though I have said we should put the case upon the ground that the exceptions showed that the offences, charged in the indictment now before us, were committed before the filing of the first complaint; yet it is not to be understood that we depart from the case made in the exceptions; and if we take the case as made up, we should be obliged to open the case, because it was not, in that event, submitted to the jury, with the proper instructions. They should have been told that it was a conclusive bar as to all sales made prior to the filing the complaint, &c.

It has been said, in argument, that the first conviction was a nullity for want of jurisdiction in the justice. But treating the first complaint as being under the 5th section of the act, as we think it should be treated, jurisdiction is, by the 18th section, expressly given to the justice to adjudge the respondent guilty as "a common seller," and inflict the fine provided in the 9th section for that offence.

We think, then, the judgment of the county court must be reversed, and the cause remanded to the county court, unless the attorney for the government shall elect to enter a *nolle prosequi*.

During the term a *nolle prosequi* was entered.

THE SOCIETY FOR THE PROPAGATION OF THE GOSPEL IN
FOREIGN PARTS v. THE TOWN OF SHARON, WILLIAM HAY-
DEN AND ELI HAYDEN.

*Adverse possession. Notice of repudiation of tenancy under a
perpetual lease at nominal rent.*

A title to lands granted to the society for the propagation of the Gospel in foreign parts can be acquired by fifteen years adverse occupancy, since the passage

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of the act of 1832, (Laws of 1832, p. 4, Thomps. Comp. 57,) repealing all acts exempting persons beyond seas from the operation of the statute of limitations.

The occupancy of a person in possession at the time of the passage of that act, under a warranty deed from a person who derived his title by a perpetual lease from a town claiming and acting under the law of 1794, directing the appropriation of the lands granted to that society, was a possession adverse to the title of the society, even though he might, notwithstanding his warranty deed, have been estopped from setting up any title adverse to the town.

A conveyance of real estate, with covenants of warranty, to a person, his heirs and assigns, as long as wood grows and water runs, in the form of a lease, but reserving only a nominal rent if demanded, and without reserving any right of re-entry, is, in effect, a conveyance of the fee; and does not create such a tenancy as, upon a repudiation of it, would require notice to be given to the grantor. The object of a notice of the repudiation of a tenancy being required is to enable a landlord to protect his rights; but under such a conveyance, the conveyer would have no rights to protect.

EJECTMENT for lands in Sharon. In the writ which was dated January 30th, 1852, the plaintiffs were described as "the society for the propagation of the Gospel in foreign parts, a corporation duly established in England, within the dominions of the Queen of the United Kingdom of Great Britain and Ireland, the members of which society are aliens, and subjects of said Queen."

Plea, not guilty; trial by jury, May Term, 1855,—UNDERWOOD J., presiding.

The plaintiffs read in evidence the charter of the town of Sharon, dated August 17, 1761; the records of the proprietors of said Sharon, by which it appeared that the land in controversy had been, in the division of said town, duly allotted and assigned to the plaintiffs; an act entitled "an act directing the appropriation of lands in this state, heretofore granted by the British government to the society for the propagation of the Gospel in foreign parts," passed October 30th, 1794; and the following conveyances of said premises, viz., certified copies of a lease from the selectmen of Sharon, to Larkin Hunter, dated March 8th, 1796; a lease from said Hunter and Jason Downer to Samuel Lamphear, dated October 22d, 1800; a warranty deed from Samuel Lamphear to Eli Hayden, one of the defendants, dated November 30th, 1816; a deed from Eli Hayden to William Hayden, another of the defendants, and a mortgage deed from said William to said Eli, both dated the 14th of July, 1849; the record of a power of attorney from the plaintiffs to John A. Pratt, dated November 30th, 1830,

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recorded in the town clerk's office, in said Sharon, December 20th, 1852, and a lease executed by said Pratt, as attorney of the plaintiffs, to the town of Sharon, dated September 12th, 1840, on which lease was the endorsement of said Pratt as such attorney, as hereinafter set forth.

It appeared in evidence that said Hunter took possession of said land under his lease, before 1800 ; and occupied the land under it till he deeded to said Lamphear ; and said Lamphear, after the lease to him, occupied the land until 1816, when he deeded to said Eli Hayden, and said Eli occupied the land, under his deed, until July 14th, 1849, when he conveyed to said William Hayden, since which time said Eli and William had occupied the land, up to the commencement of the suit.

It further appeared in evidence, that in 1833, (it being understood by said town of Sharon, that said Pratt, as agent and attorney of the plaintiffs, was making claim to said land,) said town, at the March meeting of 1833, appointed Chester Baxter, William Steele and Luther Fay, a committee to confer with said Pratt in relation to the same ; that some time previous to March, 1835, said committee did confer with Pratt ; and said William Steele, called by the defendants, testified : "Pratt appeared as agent of the society, clothed with power to settle, as he said ; and fixed on a sum of money to answer for all rents due and to become due. We accepted of the proposition, and gave our note for the full amount, and reported our doings verbally to the town. The town accepted of it ; the sum fixed on was \$300 and the back rents. We gave the note before we reported to the town. Pratt agreed we should have a durable lease. We were to have the land free of all rents." Cross-examination,—“I dont know whether Pratt showed his power of attorney, I dont recollect,” and on re-examination, “no particular form of conveyance was agreed on, it was to be a quit-claim, a clear title, clear from all claims for rent.” And on further cross-examination he testified, “the town voted to accept our report and pay our note.” This was all the testimony relative to the terms of said settlement, which was given, or of the agents' knowledge of the extent of Pratt's agency.

It appeared that afterwards, in 1840, said note was paid in full to Pratt, and thereupon, on the 12th of September, 1840, the said

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lease to the town, and said endorsement and receipt thereon, were executed. Pratt, in his annual returns to the plaintiffs, as their agent, did not charge himself with said back rents, or with \$300; but he returned \$18, as paid each year, to wit, in 1841, 1842, 1843 and 1844, "by Tyler & Hitchcock," the names of the persons who signed said lease as selectmen of Sharon.

No further evidence was given. The plaintiffs requested the court to charge the jury, that if they found that the agents of Sharon knew of the extent of Pratt's authority, and found that said authority was as the evidence tended to prove, and that the lease and receipt for rent was pursuant to their agreement, the plaintiffs were entitled to recover. The court refused so to charge, but decided, upon the above facts and testimony, that the plaintiffs were not entitled to recover, and directed the jury to sign a verdict for the defendants, to which the plaintiffs excepted.

There was no evidence tending to show that Pratt's power or agency was other than that which was conferred on him by his power of attorney.

The charter of the town of Sharon granted "one share for the incorporated society for the propagation of the Gospel in foreign parts."

The lease from the town of Sharon to Larkin Hunter was as follows:

"This indenture made this 8th day of March, 1796, between
"the selectmen of the town of Sharon, in the county of Windsor,
"and state of Vermont, on the first part, and Larkin Hunter of
"the same town, county and state, on the second part, witnesseth:
"that the said Selectmen of Sharon, aforesaid, by virtue of an act
"passed by the legislature at their session at Rutland, October the
"30th day, 1794, intituled an act directing the use of the rights of
"land in this state, heretofore granted by the British government,
"for the propagation of the Gospel in foreign parts, said selectmen
"of the first part, doth covenant in their capacity for themselves
"and their successors in office with the said Larkin Hunter, of the
"second part, for the consideration hereafter mentioned, to lease to
"the said Larkin Hunter the forty acre lot belonging to the propa-
"gation right, in the town of Sharon, aforesaid, so long as water
"runs and wood grows, in free peaceable possession, to possess for

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"himself, his heirs and assigns, on his yielding and paying one barley-corn annually, if demanded, and furthermore the said selectmen of the first part, by virtue of said act, and in behalf of said town, have a legal right to lease said land, as aforesaid, and in their capacity, do engage to warrant and defend the possession aforesaid to the said Larkin Hunter, his heirs and assigns.

"In witness whereof the parties have hereunto set their hands and seals this 8th day of March, 1796."

The lease from Hunter & Downer to Lamphear was similar in form to that of the selectmen of Sharon to Hunter, as above recited. The subsequent conveyances to the Haydens were deeds of bargain and sale of the premises. The power of attorney to John A. Pratt, only empowered him to lease, let or demise any of the lands belonging to the society in the county of Windsor, reserving annual rents. His lease to the town of Sharon was for so long as wood grows and water runs, reserving an annual rent of eighteen dollars; and on the back of the lease was the following endorsement or receipt, signed by said Pratt as attorney for the plaintiffs.

"Received of the selectmen of Sharon, four hundred and seventy-one dollars and ninety cents, which is in full for all the rents which are due on the within lease, or which may become due, so long as wood grows and water runs."

A. P. Hunton and O. P. Chandler for the plaintiffs.

The defendants cannot hold the lands discharged from the rents, by force of the statute of limitations.

The statute did not commence running until the statute was passed in 1832, repealing the exemption in favor of persons beyond seas. *Prop. Society v. Pawlet*, 4 Pet. 480.

The legislature have sanctioned this view of the case by the act of 1832, repealing the exemption in favor of persons beyond seas.

Slade's Statutes 291, act of 1797 exempts persons beyond seas; p. 292, act of 1801 exempts land sequestered to pious uses; the same exempts such land from all previous statutes; p. 293, act of 1819 repeals two preceding statutes, so far as relates to the propagation right; vol. 2, p. 58, stat. of 1832 repeals exemptions in favor of persons beyond seas.

In 1840, before the statute had run, since the repeal of the ex-

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emption in 1832, Sharon attorns to the plaintiffs by taking the lease from the plaintiffs.

That attornment binds Sharon, and all parties holding under them, whether by lease, sub-lease or deed from their lessees,—for they all stand in the place of Sharon.

If A, having no title, leases land to B, who enters and occupies fifteen years, he thereby acquires title, not for himself, but for his landlord. If, in the meantime, the landlord attorns to, and takes a lease of the real owner, the tenant can afterwards acquire no title either for himself or for his landlord. Not for his landlord, who is estopped by his lease, nor for himself, for his occupation is that of his landlord. *Jackson v. Davis*, 5 Cow. 129. *Buswick v. Thompson*, 7 Term. 484. *Rennie v. Robinson*, 8 Eng. Com. L. 275. *Lord v. Bigelow*, 8 Vt. 445.

When a person in possession can hold rightfully in one character, the law will presume that he is holding in that character, and not that he was holding wrongfully and adversely.

Since the attornment by Sharon in 1840, the defendants Hayden could rightfully hold under the plaintiffs, by virtue of their lease to Sharon, for the plaintiffs could not evict them, except for rent, therefore the law will presume they were holding in that character.

The lease was, in fact, intended for their benefit, and it is fair to presume that they acquiesced in it. *Benson v. Betts* 8 Wend. 181. *Record v. Williams*, 5 U. S. Cond. 242.

The town of Sharon has never been evicted, nor have their lessees, in such manner as to interrupt the relations of tenancy, either as between Sharon and the plaintiffs, or as between Sharon and the other defendants. A conveyance by deed of warranty, by a lessee, only operates as an assignment of the lease by the grantee. *Pingrey v. Watkins*, 15 Vt. 479; *Blake v. Howe*, 1 Aik. 306; *Bowler v. Walker*, 1 Vt. 18; nor did those claiming under Sharon ever surrender the possession or repudiate their tenancy.

But it may be claimed that the lease of 1796, from the selectmen to Hunter, was, in effect, an absolute conveyance, and created no tenancy, and that, therefore, the other defendants could not be affected by the attornment of Sharon, either on account of its being a durable lease or for the smallness of the rent we answer:

1. The statute, under which they were acting, required a reser-

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vation of rent to be made in the lease. It does not appear that any other consideration was paid, other than the reservation of the barley-corn. Both parties are supposed to have created this as a sufficient rent to keep within the statute, and it is not for the lessee and those under him to repudiate that character of the transaction. They intended to create a tenancy subject to rent, and they did so in terms, and although in a suit between the parties for the rent, the doctrine "*de minimis*," might apply, yet it should not be applied in the construction of the lease, especially in aid of an unjust defense.

2. It is not true that a perpetual lease, reserving an annual rent, does, in law, amount to an absolute conveyance. In the case of *Arms v. Burt*, 1 Vt. 303, and *Stevens v. Dewing*, 2 Vt. 411, the leases referred to were, in effect, nothing more than conditional deeds; the parties intended they should have that effect, and the court gave them that construction. They ruled that the words "as long as wood grows" &c., means forever. Had there been a reservation of an annual rent, it would have created a tenancy.

W. C. French and *L. B. Peck* for the defendants.

The defendants Hayden hold under a title starting under a conveyance, by the town of Sharon, to Larkin Hunter, March 8th, 1796. That conveyance was in fee, and the claim under it has been continually adverse to the plaintiffs.

The conveyance to Hunter was not a lease, but in fee. It is a lease so long as wood grows and water runs, and that is a fee. *Rood v. Willard*, Brayt. 67. *Arms v. Burt*, 1 Vt. 309. *Stevens v. Dewing*, 2 Vt. 415.

An estate which may continue forever is an estate in fee. 1 Prest. Est. 419.

The relation of landlord and tenant does not exist between vendor and vendee. *Watkins v. Holman*, 16 Pet. 25. *Winterbottom v. Ingham*, 7 Ad. & Ell. 611. *Blight's lessees v. Rochester*, 7 Wheat. 535.

The relation, then, of landlord and tenant did not exist between the town and Hunter, and his successors, and the Haydens, are not affected by subsequent acts or admissions of the town.

Concessions of a grantor, that he held as tenant, made while in

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possession even, are never received in evidence against his grantee, who holds by a deed on record, showing him in possession in his own right. Such proof would defeat our registry system. *Carpenter v. Hollister*, 13 Vt. 557. *Claremont v. Carlton*, 2 N. H. 369. *Hines et al v. Soule*, 14 Vt. 105.

The plaintiffs' right is barred by the statute of limitations. The entry and possession of Hunter and those claiming under him, was adverse to the plaintiffs. This was fully settled by the case of the *same plaintiffs v. Pawlet et al.*, 4 Pet. 480.

The saving clause in the act of 1797, for persons beyond seas, was repealed in 1832, (Comp. of 1835, p. 58.) And the exemption of lands "given granted or sequestered to pious uses," was repealed in 1819. Slade's Comp. 293.

If the conveyance to Hunter is to be regarded as void, on the ground that no rent is reserved, as required by the act of 1794, the plaintiffs stand in no better position. The town cannot assert any claim to the land as against the Haydens. Their possession has been in their own right, and adverse to the town, as well as to the plaintiffs. They have acquired a title as against everybody. Eli Hayden entered under a warranty deed from Lamphear, dated November 30th, 1816, and has ever since occupied the land under this deed. In 1849, he conveyed to the defendant. His possession was clearly adverse. Perhaps the town might have ejected Hunter within fifteen years after his entry, if the conveyance was void; but they could not have sustained the action after that period, as the fifteen years would commence running on his entry. 8 Johns. 262. 4 Johns. 390. 9 Mass. 508. 15 Mass. 471. 2 Cruise 243, pl. 82.

The opinion of the court was delivered, at the circuit session in October, by

BENNETT, J. In the opinion we are about to pronounce, we shall only consider those points which we find it necessary to do, to dispose of the cause. It is not to be questioned, at the present day, but what the plaintiffs can maintain this action upon their title, unless, for some good cause, their right has been barred. We will first consider how the plaintiffs' case stands as against the Haydens. The exceptions show that in 1796 the town of Sharon, by

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their selectmen, leased this lot of land to one Larkin Hunter, as long as wood grows and water runs, under the act of our legislature, passed in 1794, entitled "an act directing the appropriation of lands, heretofore granted by the British government to the society for the propagation of the Gospel in foreign parts," he yielding and paying one barley-corn annually, if demanded; and that before 1800 Hunter took possession under his lease. This was not an entry for the plaintiffs, and in virtue of their title, but was most clearly adverse to it. The town of Sharon claimed the lot as grantees under the state, and not as tenants to the plaintiffs, or as subordinate to their rights, but they claimed a paramount right in exclusion of all right in the plaintiffs. This, then, clearly was an adverse possession, as against the plaintiffs, and so it was considered in the suit in favor of this *same society v. The Town of Pawlet and O. Clark*, 4 Pet. 506. Hunter's possession, under his lease, was continued down to the time when he and Jason Downer, in October, 1800, executed a lease of the lot, as long as water runs and wood grows, to Samuel Lamphear, and to his heirs and assigns, he paying or yielding a barley-corn annually, if demanded, and we find that Lamphear occupied the lot, after he took his lease, up to November, 1816, when he conveyed the lot by warranty deed to Eli Hayden; and he occupied under his deed until July, 1849, when he conveyed the lot to William Hayden, by a warranty deed; and from that time the two Haydens occupied the lot, up to the time this suit was brought. No question can arise, but what the possession of Eli Hayden was adverse to the title of the plaintiffs. It was under a claim of title not derived from or through the plaintiffs, and it was continued long enough in himself personally, to ripen into a perfect title. Is there anything, then, in this case to prevent the statute from having run in favor of Eli Hayden, upon his own personal adverse possession against the present plaintiffs? The act of 1797, (Slade's Comp. 289, § 6,) bars any real action for the recovery of lands, tenements or hereditaments, where the cause of action shall have accrued after the passing of the act, unless brought within fifteen years next after the cause of action accrued, and the tenth section of the same act provides, among other things, that it shall not extend to bar persons beyond seas, without any of the United States, if the action shall have been

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brought within fifteen years from the time the impediment shall have been removed. In 1801, the legislature passed an act declaring that nothing contained in the act of 1797 should be construed to affect the title of any lands granted, given, sequestered or appropriated for public or pious uses, or lands belonging to the state; and in 1802 they passed a more extended act, declaring that nothing in any statute of limitations, theretofore passed, should be construed to affect any lands granted, given, sequestered, or appropriated to any public, pious, or charitable use, or to any lands belonging to the state. The statute of 1797, with its subsequent modifications, is the governing statute of limitations, so far as the rights of Eli Hayden are concerned, growing out of his own personal adverse possession. The act is prospective in its terms, and the entry of Eli Hayden in 1816, under his deed, was clearly adverse to the title of the plaintiffs, although grants for pious and charitable uses were not excepted from the operation of the act of 1797, in the act itself, yet the acts of 1801 and 1802 create them an exception, so that the act of 1797 would not run against such grants, so long as those acts continued in force. It is not questioned in this case, and could not well be, but what the grants to the society for the propagation of the Gospel in foreign parts, are to be deemed as grants for pious and charitable purposes, within the purview of the acts of 1801 and 1802. So long, then, as those acts were in force, the statute would not run upon the adverse possession of Eli Hayden. In 1819, however, the legislature repealed the acts of 1801 and 1802, so far as they related to the grants of land in this state, to the society for the propagation of the Gospel in foreign parts, and upon the repeal of those acts, the adverse possession of Hayden would cause the statute to commence running in his favor, against the plaintiffs, unless they were saved from the effect of the statute of 1797, by the exceptions contained in the tenth section, as being "beyond seas, without any of the United States." We do not find it necessary, in this case, to express any opinion on the question, whether the plaintiffs were "beyond seas," within the provisions of the exceptions in section 10 of the act of 1797, so as thereby to prevent the statute from running against them. In 1832, the legislature passed an act, most sweeping in its terms, and which enacts, that "every clause or

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sentence of any statute of limitations of this state, which exempts, or which might be construed to exempt any person or persons beyond seas, or any person or persons without any of the United States, from the operation of any statute of limitations, be, and the same is hereby repealed." It is clear, then, that unless there is something special in this case to prevent it, the statute would commence running against the plaintiffs, upon the adverse possession of Eli Hayden in 1832, and would ripen into a perfect title after the expiration of fifteen years from that time, and the case shows that he occupied under his deed until the 14th of July, 1849. It is claimed by the plaintiffs' counsel, that the effect of the negotiation between the town of Sharon and John A. Pratt, in relation to this lot of land, and which commenced in 1833, and ended in the execution of a permanent lease of the lot to the town, by Pratt, in virtue of a power of attorney from the plaintiffs, said lease bearing date the 12th of September, 1840, and upon its face reserving certain annual rents, would be to estop the town from setting up an adverse possession against the plaintiffs, or denying their title, and that this estoppel is equally operative against the Haydens.

Though it be assumed that the relation of landlord and tenant, technically existed between the town and Hunter, and also as to Lamphear and his grantees, so that neither of them, in an action by the town, could be permitted to deny the title of the town, yet it is well settled that a tenant may repudiate his tenancy, and claim adverse in his own right against his landlord, and the statute will commence running against the landlord, from the time he has notice of such repudiation of the tenancy. See *Willison v. Watkins*, 8 Peters 43. *Geerno v. Munson*, 9 Vt. 37. *Administrator of North v. Barnum et al.*, 10 Vt. 223. When Lamphear, in 1816, assumed to give to Eli Hayden a warranty deed of this lot, in fee simple, with the usual covenants to secure the title, and Hayden accepted it, and assumed to hold under it, it was, in effect, a repudiation of the tenancy, not only by Lamphear, but also by his grantee Hayden.

Though this may be a full and an unequivocal repudiation of the tenancy, still it may be said, the statute would not run until the landlord had notice of it, and that the case shows no such notice. But suppose the statute would not begin to run against the town,

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until notice had been given, can that help the plaintiffs' case? The relation of landlord and tenant never existed between the plaintiffs and the town, at least previous to the lease in 1840, or the plaintiffs and Hayden. Their claims of title were always adverse, and though it should be conceded that Hayden might be estopped from setting up an adverse possession, as against his landlord, until the landlord had notice of the repudiation of the tenancy, still this estoppel would not, as I should apprehend, extend to the plaintiffs, who claimed by a title adverse to that of the town. The case of *Administrator of Hall v. The Town of Coventry and F. W. Hammond*, 4 Vt. 295, seems much in point.

The paper title of the plaintiff, in that case, was admitted, and the only question was, whether he was barred of his action by the statute of limitations. The evidence tended to show that for more than fifteen years before suit brought, the possession of the lot had been taken under the town, and the possession of the lot under the town, had been transmitted from one occupant to another, they paying rent to the town, until that part of the lot sued for passed into the occupancy of Hammond, and rents had been paid on it to the town, as one of its public lots. The court charged the jury, if they found an actual possession of the premises demanded, adverse to the plaintiff's title, to have been taken by the defendant Hammond, or those under whom he claimed, and continued more than fifteen years without interruption, before the suit was brought, whether such possession was subject to such supposed right of the town or not, the action was barred. It was claimed in the argument that the possession of Hammond could not avail him personally, because he occupied under the town, and it could not avail the town, regarding him as their tenant, because it was said a town could not acquire a title by an adverse possession. But the court did not adopt the argument of the counsel in either respect. They say, "whether the possession of Hammond for fifteen years shall enure to his benefit, or that of the town, is a matter between him and the town merely, and whether Hammond claimed in his own right or under the town, was immaterial. Either," they say, "was adverse to the plaintiff's title." So it may be said, I think, of Hayden's possession, in the present case.

But from the exceptions it is clear, so far as the plaintiffs are

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concerned, at least, that the *adverse* possession of Hayden was in his own right, and not in the character of a tenant, under the plaintiff. He purchased the entire fee of Lamphear, upon a consideration of six hundred dollars, as named in the deed, and took from his vendor an absolute warranty deed, with the common covenants, and entered and occupied under his deed; and no estoppel from his relying upon his adverse possession, in his own right, can be urged against him by the present plaintiffs. If Eli Hayden had a valid title, in his own right, against the present plaintiffs, a good title was conveyed to William Hayden, in July, 1849; and it is to be presumed William Hayden entered under his deed, though this is not expressly stated in the exceptions. I should apprehend the lease from the plaintiffs to the town of Sharon, executed in 1840, could not help the plaintiffs out of their difficulty, although we assume it to be a valid lease, and unaffected by the discharge of Pratt, as the agent of the plaintiffs. Eli Hayden was in the *adverse possession* of the lot, from the time he took possession, under his warranty deed, in 1816, in point of fact, both as to the plaintiffs and the town of Sharon.

Whatever effect this lease may have, as between the plaintiffs and the town, it cannot, I should apprehend, have the effect to create a tenancy between the plaintiffs and Eli Hayden. The town, when the tenancy was first created, and, indeed, up to 1840, stood upon their *adverse right* to the plaintiffs, and all that could be claimed of the tenants, was to attorn to the town, as their landlord, and the town could not compel them to attorn to the plaintiffs. As the defendant Hayden claimed *adverse* to the plaintiffs, and had a right to so claim, from the time he went into possession under his deed, until his claim had ripened into a title, there is no ground to presume he was holding as a tenant to the plaintiffs, and that he acquiesced in the lease to the town, and consented to hold, as tenant to the plaintiffs. Besides, the exceptions expressly find "that he occupied, under his deed, until the 14th of July, 1849." As against the plaintiffs, the Haydens have the better title; and, as it was well said in the case of *Hall's Administrator v. Town of Coventry and Hammond*, 4 Vt. 297, whether the possession of the defendant Eli Hayden, for 15 years, shall enure to his benefit, or to that of the town, is a matter between him and the town merely.

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So far as the plaintiffs were concerned, it was immaterial whether Eli Hayden claimed in his own right, or under the town. Either would be *adverse* to the title of plaintiffs.

But there are other grounds upon which this case may be put, and which, perhaps, to some, may be the more satisfactory and better ground to rest the case upon. Though the conveyance from the town to Hunter, and from Hunter to Lamphear, may be technically in the form of a lease, yet it is apparent that it was never the intention of the parties to create the substantial relation of landlord and tenant between them, but that the instruments, whatever you please to call them, should, in effect, convey a fee. They run to the lessee, to his heirs and assigns, as long as wood grows and water runs, reserving, as rent, *one barley corn*, annually, if demanded. To all substantial purposes, the leases, if you call them such, conveyed the fee. They are but leases, in form. No rights, or duties, which ordinarily exist between landlord and tenant, are created by them. They are permanent in their character; the lessee is not bound to keep in repair, or surrender up the premises upon any condition whatever; and, in fact, the leases contain a covenant to warrant and defend the possession *to the lessee, and to his heirs and assigns*; and no rent is reserved, for the non-payment of which, an ejectment could be maintained. The barley corn rent is but nominal, and it is only payable *if demanded*. The maxim, *de minimis &c.*, may well apply to the case. If we regard Hunter and Lamphear as strictly tenants, under the town, and that that tenancy was binding upon Hayden, although he entered into possession and had the title by a common warranty deed from Lamphear, yet it is not a case where notice was necessary to the town of the repudiation of the tenancy, by Hayden, in order that the statute might run not only against the plaintiffs, but also against the town. The very object of requiring notice to the landlord is, that he may protect his rights; but to require it where he has no rights to protect, would be a useless ceremony.

The law will not require an idle act to be done. The fact that Hayden purchased the premises in fee, took a warranty deed, and entered into possession under it, and claimed title by reason of it, was a full repudiation of all tenancy under the town, and no notice, in this case, being necessary to the town, the *adverse possession* at

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once became *operative* against it, and, as a result, the title became perfect in Hayden before the execution of the lease from the plaintiffs to the town, in 1840, as against the town, and consequently he cannot be affected in his rights, by reason of the town's taking that lease, he not being in any way privy to it; and before this suit was brought, Hayden had acquired, against the plaintiffs, a title by more than fifteen years adverse possession, it having, at all events, commenced in 1832.

The result must be that no recovery can be had against the Haydens, because they have the title; and none against the town, because they were not in possession by themselves, or tenants, when the suit was commenced. In this view it is not necessary to decide what should be the effect of the lease to the town, in 1840, as between the immediate parties to it.

Judgment of the county court is affirmed with costs.

SAMUEL STONE v. DAVID HUGGINS.

Assumpsit. Liability of the defendant upon the facts reported.

The plaintiff having, at the request of the defendant, who was one of the selectmen of the town of Windsor, taken the highway tax bill of one of the districts in said town, and having made expenditures of labor and money in the necessary repairs of the highways in said district to an amount largely exceeding all that he was able to collect on said tax bill, which he had been unable to recover of said town; it was held that upon the facts found and reported, the defendant had assumed, and was under no personal liability for the same.

BOOK ACCOUNT. The auditor reported substantially as follows. At the annual March meeting of the town of Windsor, in the year 1848, the defendant was chosen first selectman of said town, and took upon himself the duties of said office; and at said meeting, Joel S. Houghton was appointed highway surveyor for district No. 5, in said town. In the latter part of May, 1848, the defendant went to Houghton with the tax bill and told him he was appointed surveyor for said district. Houghton declined to take the bill, and

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thereupon the defendant told him if he would take the bill and receipt it, and go around one day with it, and see who would work and who pay money, that he, (Houghton) should be at no further trouble with the bill: Houghton did thereupon take and receipt said bill upon that understanding, and went round with it as requested, and notified the tax payers of the time to work upon said bill. Some few days afterwards, Houghton met the defendant and told him he must take the tax bill and work it out, or get some one; that he, Houghton, should do nothing more about it; and thereupon the defendant inquired of him who would be a good hand to take and work out said tax bill; the plaintiff was named as being a good hand for that purpose, and Houghton and defendant concurred that he would be; and the defendant requested Houghton to request one Bridge to tell the plaintiff that the defendant wanted him to come and take said tax bill and work it out. In some short time after this, the plaintiff called at said Houghton's in pursuance of the word sent to him by the defendant through said Houghton, and said Bridge, (which was given to the plaintiff by said Bridge,) and got said tax bill with the consent of Houghton; and after the plaintiff thus got said tax bill, he saw the defendant on the subject, who told him he wanted him to take charge of the work on the roads in that district; and thereupon the plaintiff notified the tax payers set in said bill; and on the 5th of June, began work in repairing the highways in said district, and so continued, with occasional intervals, till the 24th of August, 1848.

The plaintiff presented his account, in which the charges were for labor and materials performed and furnished by the plaintiff, in and about the work and repairs on the highways, in said district, and in collecting said taxes, by reason and as the result of what had occurred in relation thereto, as above set forth. There were two of said highways, one called "the brook road," the other "the brick-yard road." In the repairs made on said roads by and under the plaintiff, twenty-one dollars were paid in labor by the tax-payers named in said bill, and performed and laid out on said brook road. The residue of the expenditures therein was embraced in the plaintiff's charges in his account. The plaintiff collected in money, on said tax bill, seventy-two dollars and four cents. Of the plaintiff's charges for labor by himself and others, about ninety-

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five dollars were for repairs upon the "brick-yard road," which were not commenced till those on the brook road had been completed. The first work done on the brick-yard road was on the 29th day of June, 1848. The tax-bill amounted to \$269.83. At the time the plaintiff began work on the 5th of June, and up to the time he went to work on the brick-yard road, the last named road was badly out of repair, and difficult and dangerous to use. During the progress of the work on the brook road, the defendant told the plaintiff that the brick-yard road must be repaired. About the time the work on the brook road was finished, in conversation between the plaintiff and defendant, about the work on, and repairs of the highways in said district, the plaintiff informed the defendant that the money which he had been able to realize from said tax-bill was nearly exhausted. The defendant told the plaintiff that the brick-yard road must be fixed at any rate. The plaintiff thereafter went on and fixed said road, for which he has charged in his account. The repairs made by and under the plaintiff, were needed and properly made, as well upon the brook as upon the brick-yard road.

The plaintiff had no authority by law, to enforce the collection of the taxes in said bill; he collected all that he could without authority, and made all reasonable effort to collect more. For time spent in and about making such collection, he charged in his account. During the time the plaintiff had said bill in his possession, he applied to the defendant, as one of the selectmen to give him authority to enforce the collection of said taxes, or to put said bill into the hands of the constable to collect; and once in the summer of 1848, and after the work on the highways was finished, the plaintiff informed the defendant and Peter Houghton together, (said Houghton then being one of the selectmen of said town of Windsor,) that a portion of the taxes aforesaid were uncollected, and that he could not collect them without authority, and requested them to give him authority in that behalf, which they declined then to do, and never did do. The tax-bill remained in the plaintiff's hands till the spring of 1849, at the time the selectmen of 1849, (of whom the defendant was one,) were making out the highway taxes for that year, when the defendant went to the plaintiff's house, in plaintiff's absence and got said tax-bill to use in making

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up the new tax-bill, and thereupon the uncollected arrears of said tax-bill of 1848, were carried forward and embraced in the tax-bill of 1849, in pursuance of the usage in said town in that respect. This was done without objection or claim to the contrary on the part of the plaintiff. The plaintiff, in taking said tax-bill and doing what he did in respect thereto, and making the repairs on said highways, supposed he was acting by the procurement of the selectmen of Windsor, and that the town would pay him for his services and expenditures, and had no thought or suspicion to the contrary, till some time in May, 1849, after said tax-bill had been taken from him, when he made application to the selectmen in that behalf, and they declined to recognize or pay his claim, and denied the liability of the town therefor. The defendant made no other employment of the plaintiff than is above set forth, and gave no other direction to the plaintiff, as to what work, or what amount of work to do, or expenditures to make, than is above set forth, and the plaintiff had no other directions from any source except what was contained in the warrant appended to the tax-bill. It did not appear that the plaintiff was ever employed by the defendant, or by any person acting in his behalf, to perform any labor or make any expenditures on said highways, with the understanding on the part of either, at the time of such employment, or while said work and expenditures by the plaintiff were going on, that the same were upon the credit of the defendant, nor that the defendant ever recognized the same as having been performed or made on his credit. None of the selectmen of Windsor, for the year 1848, except the defendant participated in the employment of the plaintiff, and what was done in that behalf, was the sole act of the defendant, though it did not appear that this was known to the plaintiff till sometime in May, 1849, when his claim and the liability of the town was denied.

It did not appear that the plaintiff had authority from the defendant, or any one else, except as above set forth, to exceed or anticipate the available amount of the tax-bill, in his services and expenditures, nor that he was aware, except as above set forth, that he was exceeding or had exceeded the amount he was able to collect on said tax-bill, till after said work was completed; nor did it appear that, in his said work and expenditures, the plaintiff did ex-

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ceed what might have been collected by him on said tax-bill, if he had had full authority in law to enforce such collection.

The plaintiff brought a suit against the town of Windsor and West Windsor, (said towns prior to January 1st, 1849, constituting the single town of Windsor, but were at that time divided in pursuance of an act of legislature,) at the May Term, 1850, of the Windsor county court, being an action of book account, to recover the same account for labor and expenditures, that the present action is brought to recover of the defendant, in which first named action, final judgment was rendered for the defendants by the supreme court, at a special term in June, 1851.

The auditor reported \$ 135.85 as the balance due to the plaintiff, subject to the opinion of the court as to \$ 41.50 for which the plaintiff had become liable under circumstances detailed in the report, but which he had not actually paid—a more particular statement in reference to which is rendered unnecessary by the decision of the court in reference to the entire claim. The auditor also made an additional report, the only part of which, which it is necessary to set forth, being sufficiently stated in the opinion of the court.

The county court, December Term, 1855,—UNDERWOOD, J., presiding,—rendered judgment *pro forma* for the plaintiff to recover the largest sum reported.

W. Currier and Washburn & Marsh for the defendant.

Coolidge & Safford for the plaintiff.

The opinion of the court was delivered, at the circuit session in October, by

BENNETT, J. This is an action on book, in which the plaintiff seeks to recover of the present defendant his account for certain expenditures in repairing two certain roads in the town of Windsor, in 1848. The case comes up under somewhat peculiar circumstances, and we have endeavored to give it our careful attention.

It is not claimed, by the plaintiff's counsel, that the services and expenditures charged in his account were had upon the personal credit of the defendant; and in this they take a right view of the case. It is clear to my mind, from the auditor's report, that the

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plaintiff rendered the services and made the expenditures, expecting to be reimbursed for the same, from the avails of a tax-bill, which was put into his hands to work out.

The plaintiff puts his case upon the ground that the defendant contracted with him to do what was done in behalf of the town, and upon their credit and responsibility, and that having failed to give him a legal remedy against the town, he has made himself personally responsible, and that too in this form of action.

It is a common principle, that when a person undertakes to act as an agent for another person, and in his name, without authority for that purpose, and this unknown to the other party, the person assuming to be agent, makes himself personally responsible.

We are met at the threshold of this case with the inquiry whether, upon anything like a fair construction of the report itself, the defendant undertook to bind the town to pay the plaintiff's account. If not, there must be an end of the plaintiff's case, without going further. It becomes necessary to attend carefully to the facts reported by the auditor. It seems Joel S. Houghton was appointed highway surveyor for District No. 5 in Windsor, in 1848; and as such he received the tax-bill, and assumed the responsibility of highway surveyor. It does not seem to be of importance, in one point of view, what induced Houghton to accept the office, or what were his motives in not going on himself to work out the tax, or what arrangement had been made between the highway surveyor and the defendant in regard to the highway surveyor's having no further trouble with the tax-bill, in case he would go around one day with it and see who would work and who would pay the money. The highway surveyor had become legally responsible to the town for the faithful expenditure of the tax, in repairing the roads in his district; and, while under this responsibility, he says to this defendant, "he must take the tax-bill and work it out or get some one to do it," which was acceded to by the defendant. Word was sent to the plaintiff by the defendant, that he wished him, "to come and take said tax-bill, and work it out." It seems that this application was made to the plaintiff with the concurrence of the surveyor in the plaintiff's being a suitable man to expend the tax. The plaintiff called upon the surveyor accordingly, and got the tax-bill, by the consent of the surveyor; and, when the plaintiff

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called on the defendant with the tax-bill, the defendant, knowing that he had got it, said to him, "he wanted he should take the charge of the work on the highways in said district," and, thereupon the plaintiff proceeded to notify the tax-payers set in said tax-bill, to work out their taxes, and he went on to make the repairs on the roads. What was said about the plaintiff's taking charge of the work on the roads, in that district, is to be taken in connection with the request which had been made to him, to get the tax-bill and work it out, and, so it was evidently understood by the plaintiff; for the auditor, in his additional report, expressly finds that when the plaintiff entered upon the business of his employment, as set forth in his first report, he supposed the tax-bill would be available for means of making the needed repairs of the roads in the district, and relied upon said tax-bill for said means; and it appears that, in point of fact, the amount of the tax-bill was more than sufficient to meet all the claims which the plaintiff can make for services and expenditures in repairing the roads in said district, although the plaintiff, not having any legal power to collect the tax-bill himself, failed to realize enough to meet his just expenditures. Here, then, is a case where there had been a fund provided by means of a highway tax, duly assessed, amply sufficient for the purpose of repairing the roads in the district, now in question; and, while that remained unexpended, it may well be questioned whether the highway surveyor himself could maintain an action against the town for expenditures which he might make in repairing the roads. We see no reason, thus far, to say that there was any attempt, on the part of this defendant, to bind the town. The most that can be claimed is, that the defendant, with the approbation of the highway surveyor, employed the plaintiff to work out the tax-bill for that district, and pledged *that*, as a fund which the town had provided, as the means of his remuneration. This is quite a different thing from employing the plaintiff to do the services on the general credit of the town. In the case of *Gassett v. Andover*, 21 Vt. 342, in which it was held that the selectmen of a town might direct the highway surveyor of a district to repair a road upon the general credit of the town, it appeared that the whole tax had all been previously expended, and this known to the selectmen at the time the direction was given. The auditor, it is true, finds that after it be-

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came manifest, as the result of the plaintiff's efforts to collect the taxes on said bill, that his collections would prove inadequate to meet the expense of the repairs, he went on making further expenditures, supposing that the town would reimburse him for so much as his expenditures should exceed his receipts on said tax-bill; and though this might have been a reasonable expectation, on the part of the plaintiff, yet it is not found that he received any such assurance from the defendant, or that this was within the scope of his original employment.

It becomes necessary to inquire whether the employment was subsequently enlarged by the after conversation between the parties to this suit, and did the plaintiff so understand it. It seems that the expenditures of the plaintiff were made upon two roads, one called "the brook road," and the other "the brick-yard road." The repairs were first made on the "brook road," and the auditor finds that while the repairs were going on, on "the brook road," the other road being much out of repair, the defendant said to the plaintiff, "the brick-yard road must be repaired;" and after this, and when the repairs of the brook road were nearly finished, in a conversation between the parties about the repairs of the highways in the district, the plaintiff informed the defendant that the money *that he had been able to realize from said tax-bill* was nearly exhausted, and the defendant said to him, "the brick-yard road must be fixed at any rate."

It is found in the case that the tax-bill then in the hands of the plaintiff, amounted to two hundred and sixty-nine dollars and eighty-three cents, and the amount collected on the bill, in money and work, was found to be ninety-three dollars and sixty-three cents, leaving a balance of one hundred and seventy-six dollars and twenty cents. The balance which the auditor reports as provisionally due to the plaintiff, is but one hundred and thirty-five dollars and eighty-five cents. Under the circumstances of this case, how should these general declarations of the defendant be interpreted? and how did the plaintiff understand them? and how had he a right to understand them? We apprehend they should not be understood as attempting to give the plaintiff authority to exceed, in his expenditures, the avails of the tax-bill in his hands, upon the credit of the town, but simply as *cas-*

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tionary to the plaintiff, that enough should be reserved of the tax-bill to repair the brick-yard road, at all events. This, we think, is all that the plaintiff was authorized to infer from these general remarks of the defendant. Though the report finds that the plaintiff, in doing what he did do, supposed he was acting by the procurement of the selectmen of Windsor, yet in this he was mistaken. Though, in point of fact, the defendant was one of the selectmen of Windsor, yet the case does not find that he assumed to act in that capacity for himself and his associates, or that there was any representation made, directly or indirectly, that he was clothed with any power from his associates to act on their joint account; and the auditor finds, "that what was done in regard to the employment of the plaintiff was the sole act of the defendant;" and it may be remarked that the auditor does not find that the defendant, in doing what the case shows he did do, undertook to act as one of the selectmen of the town. From the whole case, I think it is fairly to be inferred that the defendant was acting in the place of Houghton, the highway surveyor, and attempting to to see performed duties that had devolved upon him in respect to the expenditure of the tax. It had become the imperative duty of Houghton to see the tax-bill expended in the repair of the roads, if need be, in his district, and the defendant had assured him, after he had done certain things, he should have no further trouble with the bill; Houghton performed the things stipulated, and the defendant caused the tax-bill to be obtained from Houghton for the purpose of being worked out by the plaintiff, a man approved of by Houghton, as well as by the defendant; and, by a fair construction of the report, the defendant must be regarded as acting, in point of fact, as the substitute of Houghton. In the case of *Smout v. Ilbery*, 10 Mees. & Wels. 1, the point how far an agent is personally liable, who, having, in fact, no authority, professes to bind his principal, was very much discussed; and it was said by Baron ALDERSON, as the result of an examination of the authorities, that "all the cases in which the agent has been held personally responsible, will be found to arrange themselves under one or the other of three classes. In all of them," he says, "it will be found that he has been guilty of some fraud; has made some statement which he knew to be false; or has stated, as true, what he did not

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know to be true, omitting, at the same time, to give such information to the other contracting party, as would enable him, equally with himself, to judge as to the authority under which he proposed to act." There is nothing in this case to show any fraud in the defendant, nor is it pretended that he made any statement which he knew to be false, nor can it be claimed that he stated, as true, what he did not know to be true, omitting, at the same time, to state some fact which would enable the other party to judge of the authority under which he proposed to act, as well as himself. Indeed, it is all sufficient, for this case, to say that the defendant did not, as one of the selectmen of the town, assume, in any shape, to give to the plaintiff a right of action against the town.

Though it should be held, upon the facts, as appearing in this bill of exceptions, that the plaintiff could not sustain an action against the town, yet that affords no sufficient reason for holding the defendant liable.

The want of power in the plaintiff to enforce the collection of the taxes, was as well known to the plaintiff as to the defendant, and cannot have the effect to create a personal liability on the defendant to pay the plaintiff's account. The fact that the selectmen refused to give the plaintiff the means of enforcing the collection of the tax-bill, cannot have any such effect, and, if such a refusal constitutes a wrong which can be redressed by an action, it must be by a special action on the case. The fact that the town have had the benefit of the taxes which remained uncollected by the plaintiff is no reason why the defendant should be liable, in this action; and, whether the plaintiff had such an *equitable lien* upon those taxes as would enable him to follow them in the hands of the town, it is not necessary to consider, and, much less, to decide; although, apparently, as the town have had the full benefit of the plaintiff's expenditures, and have withdrawn from him the tax-bill, which he had a right to rely upon as a means of his indemnity, it would seem to be a common act of justice that they should pay the plaintiff's account. As between the parties to this suit, the case stands upon strict right. The defendant has had no special benefit from the plaintiff's expenditure, and it may be as hard for the defendant to pay the plaintiff's account as it is for him to lose it.

The result must be, the judgment of the county court is reversed, and judgment on the report for the defendant to recover his costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF ORANGE,

AT THE

MARCH TERM;

AND AT THE

CIRCUIT SESSION, IN OCTOBER, 1856.

PRESENT,

HON. ISAAC F. REDFIELD, CHIEF JUDGE.

HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.

HON. MILO L. BENNETT, }

GEORGE W. HOBART, *apt. v.* LORENZO D. HERRICK.

Contingent claim. Appeal. Bond.

No appeal lies from the report of the commissioners upon a deceased person's estate that a contingent claim was presented. An appeal only lies from its allowance or disallowance.

A creditor of an estate has the right of appealing from the allowance of a claim in favor of another creditor when the administrator declines to do so. And such

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declinature would probably be inferred, if no claim of the administrator to prosecute the appeal in his own behalf should be interposed.

Sufficiency and requirements of the bond to be given by the appealing creditor in such a case.

APPEAL from the report of the commissioners on the estate of Adam Hobart, jr. Their report, in reference to the claim, was in the words following.

"Lorenzo D. Herrick. Contingent claim on a bond of indemnity for signing note to Orange County Bank, bearing date December 6th, 1848, for \$3,300. Penalty of bond, \$6000. And signing, as surety, a note above allowed, in the name of Sally Nichols, at \$180.32."

The appellant, a creditor of the estate, in taking his appeal, filed objections to the allowance of either of said claims, setting forth reasons why they should not be allowed, &c.; and, in the bond for the appeal, the condition, after setting forth the taking of the appeal, was as follows: "now, therefore, if the above bounden George W. Hobart shall prosecute his said appeal to effect, and answer and pay all intervening damages occasioned by said appeal, together with costs, in case the said decision be affirmed, then this obligation to be null and void," &c.

In the county court, the appellee moved to dismiss the appeal, for the reasons following.

"1st. Because the claim of said Herrick, from the allowance of which the said appeal is taken, is a contingent claim, from which no appeal can be taken.

"2d. Because the said George W. Hobart is creditor, and not administrator or executor of said estate; and has no right, by law, to take an appeal from the allowance of said claim of such creditor.

"3d. Because no such bond is taken for the appeal as the statute requires, in a case when a creditor is allowed to take an appeal from the decision of the commissioners, in allowing the claim of another creditor.

"4th. Because the said appeal and said bond is irregular, informal, and insufficient in other particulars."

Upon this motion, the county court, at the June Term, 1855,—

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POLAND, J., presiding,—dismissed the appeal, to which the appellant excepted.

H. Carpenter and *P. T. Washburn* for the appellant.

The statute provides, (see Comp. Stat. p. 357, § 43,) that a contingent claim may be presented and allowed by the commissioners, or probate court; and, in either case, it becomes a judgment which fixes the *right* to a dividend out of the estate, unless appealed from. Comp. Stat. 353, § 20.

The right of a *creditor* to appeal is fully given by statute. The objection, then, is one of *form*, and not of *substance*, as to whose name shall be used. Comp. Stat. 354, § 27.

The condition of the bond taken by the probate court, in this case, is a compliance with the statute. The words are, “shall prosecute his said appeal to effect, and answer and pay all intervening damages occasioned by said appeal, together with costs.” These are sufficiently broad to protect the adverse party and the estate.

W. Hebard for the appellee.

1. The defendant's claim, from the allowance of which the appeal is taken, is a *contingent claim*. This claim is not allowed as a debt against the estate; and, being a contingent claim, it precludes the idea of being proved, as in case it could be *proved* it would cease to be contingent; Comp. Stat. 357, § 43. This, by the statute, being a mere presentation of a claim, no decree or judgment passes upon it, from which an appeal can be taken.

2. The appeal is taken by George W. Hobart, a creditor, and not by the administrator. This can be done only when the administrator declines to appeal. Comp. Stat. 354, § 27.

3. If the appeal was properly taken by the creditor, no such bond was given as the statute requires. A bond is required as well to secure the estate from damages and costs, as to secure the intervening damages and costs to the adverse party. Comp. Stat. 354, § 27. In this case, the condition of the bond is to “answer and pay all intervening damages occasioned by said appeal, together with the costs.” Whether this is intended to secure the estate from damages, or the adverse party, does not appear. It is such a sub-

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stantial departure from the requirement of the statute that, for this reason, the appeal was properly dismissed.

The appeal and bond being a statutory regulation, any departure from the statute, or any omission, renders the proceeding void, as in case of a replevin bond. *Campbell v. Marcy*, Orange County Supreme Court, 1855.

The opinion of the court was delivered by

REDFIELD, CH. J. The question in this case, whether an appeal is allowable from the report of the commissioners of the presentation of a contingent claim, seems to us decisive of this case.

It is apparent that it was not expected these contingent claims would be allowed by the commissioners, in the first instance, and, unless allowed to the amount of \$20 or more, no appeal lies.

The 45th section of the 52d chapter of the Compiled Statutes, expressly provides that, if the claims shall become absolute, and be disputed by the executor, &c., it may be proved before the same board of commissioners, or a new board, to be appointed for that purpose, "in the same manner as if presented for allowance before the commissioners had made their report." This is obviously the allowance of the claims, and the first allowance contemplated by the statute. And clearly no appeal lies, except from an allowance. For this reason, we think the appeal was correctly dismissed.

We have spent no time in regard to the other questions. The probability is, perhaps, that we might get along with the question as to the bond, by regarding it as not properly arising upon motion to dismiss, but to be brought to the notice of the court by some specific plea, and by the party interested in having the defect supplied. This bond is probably well enough, as to the creditor, being in the very words of the statute, as to the creditor appealed against, "to secure intervening damages and additional costs." But it is defective, in not containing a provision to indemnify the estate from loss. This omission will not probably render the bond void, as to creditors. And, if the estate do not choose to interfere, it is, perhaps, questionable how far the creditor can be allowed to object to the bond on account of a defect, in no way affecting his interest.

As to the right of the creditor to appeal against another creditor's

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allowance, there is no doubt of its being given in terms by the statute, in case the executor or administrator declines to appeal. And if no claim was made by the executor or administrator to appeal or prosecute in his own behalf, we ought, probably, to infer that the appeal, by this creditor, was allowed because the administrator "declined to appeal."

Judgment affirmed.

DAVID ESDON v. EVERETT COLBURN.

Landlord and tenant.

A provision, in a lease of a farm upon shares, that the produce is to be at the control of the lessor until sold, will enable the lessor to hold the crops raised on the place, against an attachment of them by a creditor of the lessee, until they are divided or sold, or all the stipulations on the part of the lessee are performed, for the security of which the provision was made.

If the rights of the lessee, under such a lease, to a part of the crops deposited in the barn upon the farm occupied by him, are sold and transferred to the lessor, upon a settlement between them, no removal of the property or change in its possession will be necessary to perfect the lessor's right to it.

TROVER for five tons of hay. Plea, the general issue; trial by jury, June Term, 1855,—POLAND, J., presiding.

Upon the trial the following facts were proved. On the 31st day of March, 1852, William Warden and his wife leased to Chester Johnson a farm in Newbury, for one year, to carry on at the halves, the lease being in writing, the principal provision in it being as follows: "said Johnson is to have said farm and stock by the halves, to have one-half of the increase and produce, and bear one-half of the loss: said stock and produce at the control of said Warden, until sold: said Johnson is to carry on said farm "in a good workmanlike manner," &c.

At the end of the year it was agreed between them that Johnson should carry on the farm another year upon the same terms as the year before. The hay in question was cut on said farm by John-

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son, in the summer of 1853, and placed in the barn upon the same farm upon which he lived. On the 24th of November, 1853, Warden and Johnson made a settlement in relation to the products raised on the farm, and, by the terms of the settlement, the hay in question was to be the property of Warden.

Immediately after the said 24th of November, Warden advertised that on the 7th day of December, 1853, he would sell said hay, and some other property, at public auction, on the farm in question. On the morning of the 7th of December, 1853, Clark & Co., creditors of Johnson, prayed out a writ in their favor against said Johnson, which one Peach was duly authorized to serve, who with James White, a member of the firm of Clark & Co., went to the farm where Johnson was still living, and to the barn where the hay was, looked at it, and told Johnson that he attached it.

Shortly after this, Warden, with the plaintiff and others, came there for the purpose of proceeding with the auction sale and, after selling some stock, proceeded to sell the hay. Peach then informed Warden and all others present that he had attached the hay in question, and forbid their selling the same. Warden, however ordered his auctioneer to proceed with the sale, which he did, and the plaintiff bid off the hay in question and gave Warden his note for the amount. Clark & Co. obtained a judgment against Johnson on the 8d of January, 1854, and took out their execution upon which the hay was advertised and sold to the defendant who soon after removed and used it. Upon these facts the county court directed the jury to return a verdict for the defendant, to which the plaintiff excepted.

A. M. Dickey and C. B. Leslie for the plaintiff.

J. Potts for the defendant.

The opinion of the court was delivered by

ISHAM, J. The hay in question was grown, during the year 1853, upon the land occupied by Johnson as lessee, and was deposited in the barn standing upon the leased premises. The plaintiff claims the property under a purchase of it from Warden, the lessor, on the 7th of December in that year. The defendant claims

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it under the sale of the property on execution, in favor of Clark & Co., against Johnson. The attachment of Clark & Co. was made on the morning of the day the property was sold to the plaintiff by Warden, and of which the plaintiff had notice at the time of his purchase. The principal question arises, whether the hay was the property of Warden or of Johnson, at the time the attachment was made.

As a general rule, a tenant is regarded as a joint owner of the crops and proceeds of the farm occupied by him, under a lease providing that they are to be equally divided between himself and his landlord. The tenant, in such case, has an interest in the crops which may be taken on execution and sold for the payment of his debts. That rule would give Johnson a right to a portion of this hay, unless his right to it is otherwise affected by some express stipulation of the parties in the lease. In the case of *Smith v. Atkins*, 18 Vt. 461, it was held, that a stipulation in a lease that the crops and produce of the land, raised during the term, shall be the property of the lessor, is a legal and valid provision, and that it will enable the lessor to hold the crops against the creditors of the lessee. The general doctrine was held, that a lessor, under such a provision in a lease, may have a general property in the products of the land though they are thereafter to be grown. The lessor may be accountable to the lessee for the value of one-half of the produce, but the lessee has no legal title or interest in the crops; he does not stand as a joint owner with the lessor. If such an agreement is valid when made to secure the payment of rent, it should be regarded as equally valid when it is made to secure the performance of other covenants in the lease. In this case, the lease provides that Johnson is to have one-half of the increase and produce arising from the use of the farm and property leased, and that the stock and produce is to be at the control of said Warden until sold. This provision, though not so full in its language as in the case of *Smith v. Atkins*, is free from any reasonable doubt as to the intention of the parties. Their object manifestly was to cut off the joint ownership of the crops and produce of the land, and vest the entire control and ownership over it in Warden. That provision could have been inserted for no object but to secure the performance of the other covenants in the lease by the lessee, and for the purpose of

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protecting the property from any improvident use or sale of it, and also to prevent its being taken from the premises by the creditors of the lessee, before the claims of the lessor were satisfied. In that view of the case, Johnson had no interest in the hay or other crops, while growing upon the land, nor after they were harvested. His right, under the lease, was only to his share of the money, after it had been sold. Johnson had, therefore, no attachable interest in the hay; no lien was acquired upon it by the attachment of Clark & Co., and no title passed to the defendant by its sale on their execution. That doctrine was the principal ground on which the case of *Smith v. Atkins* was decided, and we think it must determine the result of this case.

The settlement between Warden and Johnson, on the 24th of November, and before the attachment of this hay by Clark & Co., is satisfactory, not only as to the right of the plaintiff to this property, but also in showing what was the understanding of the parties in relation to it. There is no pretence but that the settlement was just, as between Warden and Johnson; nor have any suggestions been made that the arrangement was effected to defraud the creditors of Johnson. The substance and effect of that arrangement was an appropriation of a portion of the products of the land, in satisfaction of the claim which Johnson would have had for the money, on the sale of the property by Warden; in other words, Johnson took a certain quantity of the produce of the land, instead of waiting for the money on a sale of the property. Johnson had no interest in the hay, nor in the money that should be realized on its sale, after the 24th of November. There was no need, therefore, of a removal of the property, or any change in its possession, as Johnson never owned the hay, nor did Warden stand as a purchaser of it. The title of Warden to the hay was perfect under the lease, and all claim on the part of Johnson to any of the proceeds arising from its sale, was cut off by the settlement or arrangement made between them on the 24th of November in that year. The plaintiff, we think, acquired a valid title to this hay, under the sale of it to him by Warden, and is entitled to recover its value from the defendant, for taking and converting it to his own use.

The judgment must be reversed and the case remanded.

S. R. Bank v. Downer et al.

THE SOUTH ROYALTON BANK v. SOLOMON DOWNER AND
JOHN BLANCHARD.*Action on mortgage taken under the general banking law.*

An action upon a bond and mortgage taken by a banking institution, organized under the general banking law of 1851, and assigned by them to the treasurer of the state, in pursuance of the seventh section of that law, cannot be maintained in the name of the banking institution, until it is re-assigned by the treasurer as provided in the ninth section of the same law.

EJECTMENT for certain lands in the possession of the defendant Blanchard, as tenant of the defendant Downer. Daniel Tarbell, jr., who was the owner of the premises, on the 23d of February, 1852, mortgaged them to the plaintiffs, to secure the performance of a bond that day executed by him to the plaintiffs, for the payment, on the first of January, 1860, of sixteen hundred dollars, and interest thereon semi-annually, or, in case the same and said mortgage should be assigned to the treasurer of the state of Vermont, under, and in pursuance, and for the purposes of the act to authorize the business of banking, approved November 17, 1851, and the plaintiffs should at any time neglect or refuse to redeem its circulating notes on demand, then, and in that case, for the payment forthwith of the whole of said principal to the said treasurer. The plaintiffs, in pursuance of the provisions of said act, afterwards, on the 12th day of June, 1852, assigned said bond and mortgage to the treasurer of the state, by whom they had ever since been held, and were still held. Subsequent to the giving of said mortgage to the plaintiffs, the said Tarbell gave to the defendant Downer a mortgage of the same premises, to secure the payment of certain notes which had become due and were unpaid; and after the breach of the condition of his mortgage, by the non-payment of said notes, and before the commencement of this suit, the defendant had, by virtue of his mortgage, taken possession of the premises, and thereafter occupied them by his tenant.

Upon these facts, the county court decided that the present action could not be maintained in the name of the plaintiffs, to which decision the plaintiffs excepted.

J. S. Marcy and J. P. Kidder for the plaintiffs.

The state treasurer does not stand in the relation of an ordinary

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assignee of the mortgagee. He is merely the assignee for a specific purpose; his duties are limited by the statute under which he operates. Laws of 1851, No. 22, "an act to authorize the business of banking."

The plaintiffs have the entire interest in the lands mortgaged; it received the interest on the bond, the treasurer having no control in the premises while the bank is current. The treasurer, in the case at bar, has no right incident to an ordinary assignee. He cannot recover rents, nor account to the mortgagor on his redeeming the premises; neither *could* a right of action accrue against him in any event.

The plaintiffs have sufficient title to sustain ejectment. A plaintiff in an action of ejectment will not be prejudiced by having executed a mortgage deed of the premises since the commencement of this suit; *Gibson v. Seymour et al.*, 3 Vt. 565, and cases there cited. The plaintiffs have a good title as against these defendants; *Burton v. Austin et al.*, 4 Vt. 105.

A parol assignment of a debt will not carry with it any right in the land mortgaged to secure the same, nor entitle the assignee to enforce the mortgage, *at law*, whatever may be the effect in equity; *Parsons v. Wells*, 17 Mass. 418; *Warden v. Adams*, 15 do. 233.

The assignment of a mortgage is invalid, unless it is accompanied by an actual or constructive assignment of the debt; *Bell v. Morse*, 6 N. H. 205; *Wilson v. Troup*, 2 Cowen 195.

In this case there is no pretended assignment of any *debt*, nor is there even a right to control in the assignee, except such as is given in case the bills are not redeemed. The mortgage was primarily and beneficially to secure the payment of interest to the plaintiffs, and the interest assigned to the treasurer is that of indemnity only, upon a contingency which has not occurred. The condition having been broken by the non-payment of interest, the plaintiffs have the right to the premises until that is paid.

P. T. Washburn and *W. C. French* for the defendants.

The case shows that the plaintiffs had no title to the demanded premises, at the commencement of the suit, or at the time of judgment.

Their title rests upon the bond and mortgage. The *bond* is con-

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ditioned: 1. For the payment of the principle sum at a day named. 2. For the immediate payment of the principal, if the bank refuse to redeem their bills. The *mortgage* is conditioned to secure the performance of the conditions of the bond, and also contains covenants to perform the same conditions. And "the mortgage," with "the debt therein mentioned," and "all the covenants, agreements and conditions therein contained," was *assigned* to the state treasurer, and the assignment was duly recorded.

This assignment conveyed the legal title to the land; *Stewart v. Thompson*, 3 Vt. 255; *Pierce v. Brown*, 24 Vt. 165.

The general banking law of 1851 contemplates that the treasurer should hold the *legal title* to the land, and should have the absolute control, in the first instance, of the securities.

If any interest is secured to the plaintiffs, it is certainly *equitable*; but that will not enable them to maintain *ejectment*; *Dewey v. Long*, 25 Vt. 564; *Cheney v. Cheney*, 26 Vt. 608.

The opinion of the court was delivered by

BENNETT, J. Both parties in this case claim title to the premises sued for, under Daniel Tarbell, jr. The plaintiffs have the elder mortgage, and Downer the junior mortgage. The plaintiffs are a banking institution, organized under the general banking law of 1851, and before this suit was commenced they had assigned to the state treasurer the bond and mortgage of Tarbell, under the 7th section of the banking law, which provides that for a certain amount, instead of stocks, the bank may secure the payment of one-half of their issues, by transferring to the treasurer of the state bonds and mortgages. The 9th section provides for the re-assignment of any bonds and mortgages, by the treasurer, to the bank, upon other bonds and mortgages, or public stocks, being substituted, and, if the principal of the bonds are paid to the treasurer, he may pay the same to the bank, on receiving other bonds and mortgages. The 11th section vests the power of sale of the bonds and mortgages, if need be, in the treasurer. We think it is clear that the assignment vests in the treasurer the legal title to the bond and mortgage, though in trust, and the object of the statute requires it should be so. It must follow that, until a re-assignment,

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the plaintiffs cannot maintain this action, for want of title. No question has been raised as to the want of sufficiency in the form of the assignment.

Judgment of the court below affirmed.

SAMUEL WALLACE v. JESSE BOWEN AND SALLY BOWEN.

Inference of gift to wife of real estate, deeded to her, may be rebutted. Resulting trust to the husband. Costs. Mistake as to legal operation of a deed.

The *prima facie* inference that a deed, taken to the wife of the person who pays the consideration for it, was intended as a gift to her, may be rebutted and overcome by parol proof to the contrary; and if this is done a resulting trust will exist in favor of the husband.

In the present case, the orator having purchased and paid for a piece of land, the deed of which was taken to his wife, and the proof being satisfactory that it was not intended as an absolute gift to her; it was held that there was an implied or resulting trust, which a court of chancery would execute in his favor.

No costs allowed to the defendants who had succeeded to the legal estate as heirs of the wife, they having resisted the orator's claim, after being made aware of it before the commencement of the suit.

Semble. That if the husband had so taken the deed under a misapprehension as to its legal operation, supposing that it would have the same effect as though taken to himself and his wife jointly, a court of equity would be justified in compelling the parties interested to allow it to have that operation. REDFIELD, CH. J.

APPEAL from the court of chancery. The orator alleged that in March, 1835, he bargained for a piece of land, for which he was to pay \$900; \$100 of which he paid down, and gave his notes for the remainder, payable at different times, which he paid as they became due; that when the bargain was completed, and the deed about to be drawn, his wife Lydia Wallace said to him, in a playful manner, that he had better have the land deeded to her; and that, upon the representation of the person of whom he purchased,

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and of the magistrate who took the acknowledgment of the deed, that if it was deeded to her he would own it the same as though it was deeded to himself, he consented, and the deed was made directly to his wife; that his wife never inherited or otherwise obtained, or had any separate property of her own, except a setting out of furniture on commencing housekeeping; and that the said \$100, and the money paid upon the notes was the money of the orator, not obtained in any way from his wife; that his wife died in March, 1849, leaving no children, and never having had any; and that the defendants, her brother and sister, and only living heirs claiming that she was the owner of the land, had commenced an action of ejectment therefor against the orator, having full knowledge of the orator's claims, &c.; and prayed that the defendants might be enjoined from prosecuting said action of ejectment, and decreed to release and convey to the orator the title and interest claimed by them as heirs of his wife.

The defendants answered, insisting that the purchase of the land by the husband, and taking the deed to his wife, was intended, and operated as a gift of the same to her, and that they were entitled to it as her heirs. Their answer was traversed, and testimony was taken by both parties, the conclusion deducible from which being sufficiently stated in the opinion of the court. The court of chancery decreed substantially in accordance with the prayer of the orator's bill, from which the defendants appealed.

Peck & Colby for the defendants.

The grantee being the wife of the orator, the conveyance will be presumed to be a gift from the husband; *Sugdens Vendors*, p. 453; 2 Story's Eq., Sec's. 1202, 1203, 1204; *Marshall v. Pierce*, 12 N. H. 127; *Kingdon v. Bridge*, 2 Vernon 67; *Back v. Andrew*, 2 Vernon 120; *Glaister v. Glaister*, 8 Vesey 189; *Rider v. Kidder*, 10 Vesey 267; *Dyer v. Dyer*, 2 Cox 92; Lead. Cases in Eq., Vol 1, 162.

P. Dillingham and *A. Howard, jr.* for the orator.

The facts clearly establish a trust resulting, or arising, by implication of law, which is expressly excepted out of the statute, requiring trusts to be created by writing; Comp. Stat. §25, page 387.

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Judge Story says, "the clear result of all the cases, without a single exception, is that the trust of the legal estate results to the man who advances the purchase money;" 2 Story Eq. §1201, 4th edition.

He further remarks, "that when the deed is taken to a wife or child, and the consideration paid by the husband or father, the presumption, *prima facie*, is, that it is intended as an advancement or gift." We reply that this presumption may be overcome by proof negating such presumption—such as this case affords. See same book, §1203 and 1204; also *Dyer v. Dyer*, 2 Cox 92.

This case is not affected by the statute of frauds; parol proof is admissible against the express declaration of the deed as to the consideration; *Leach v. Leach*, 10 Ves. 511; *Boyd v. McLean*, 1 John. Ch. 582; *Botsford v. Burr*, 2 John. Ch. 404; *Pinney et al. v. Fellows et al.*, 15 Vt. 525.

The opinion of the court was delivered by

REDFIELD, CH. J. There seems to be no question, in the present case, but the plaintiff paid the consideration for this conveyance; and if the deed had been taken in the name of a stranger, there would have been a resulting trust in his favor. But this being taken to the wife, the implied, or resulting trust which arises in the case of a stranger is, *prima facie*, rebutted. But this implication, in the case of a deed so taken to a wife or child of the one paying the price of the land, that it was intended as a gift, is clearly liable in its turn to be encountered and overcome by oral evidence; and if that be done, the trust is still valid, notwithstanding the statute of frauds, which, in this state, in terms, excepts from its operation, all resulting trusts, the construction of the English statute being the same, 2 Story's Eq. Jurisprudence, § 1201 *et seq.* to §1205, and the cases cited in the notes; *Pinney v. Fellows*, 15 Vt. 525.

In the present case the proof satisfies the court, the deed was not intended as an absolute gift. It would then, upon the face of the transaction, stand as an implied or resulting trust, in favor of the husband, which a court of equity will execute in favor of the husband; although, at law, the wife cannot be the trustee of the husband, or *vice versa*, their existence being, in law, regarded as identical. We think, therefore, the orator is entitled to have the

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decree affirmed. And as the defendants were made aware of the plaintiff's claim before the suit was brought, and had opportunity to inquire into the validity of his claim, and the nature of the proof by which it was sustained, and chose to resist it, we do not think they have any just cause of complaint at the order of the chancellor, in regard to costs.* If the case did not show notice to them of the nature and extent of the plaintiff's claim, and ample time and opportunity to ascertain its character, there might have been good ground for saying the defendants should recover costs.

I have taken no time to attempt to divine the precise purpose of the parties, in having the deed made to the wife. If it were important, one would naturally enough conjecture that the plaintiff was finally prevailed upon to suffer the title to remain in the wife, because he supposed, upon such advice as he relied upon, that the deed would have the same operation, as in law it would have had, if taken in the joint names of the husband and wife, and that the survivor would take the whole land. And if that very case were established in proof, it seems to me probable that the cases would justify a court of equity in compelling the parties interested to allow the deed to have the operation which it was intended to have; and this, notwithstanding the decease of the wife, and that the misapprehension of the parties, was as to the legal operation of the deed: cases of high authority certainly go to that extent. But we regard the proof as justifying the placing the case upon the other ground.

Decree affirmed.

* What this order was, whether to pay the orator's costs, or merely a disallowance of those of the defendants, does not appear in any of the papers furnished to the reporter.

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RICHARD ALDRICH v. TIMOTHY MORSE.

Statute of limitations.

An acknowledgement of an indebtedness must, to prevent the operation of the statute of limitations, be unaccompanied with the expression of an unwillingness and refusal to pay it.

In the present case, the defendant paid one of two joint owners of the demand a specified sum for his half, saying that was all he could afford to pay, and that he would give the same for the other half, but would not give any more. *Held* insufficient to prevent the operation of the statute of limitations.

DEBT upon an allowance of commissioners, in favor of the estate of Josiah W. Rogers, against the defendant, of which estate the plaintiff was administrator, made September 8th, 1843 for \$186.12. The defendant plead the statute of limitations, to which the plaintiff replied a new promise, which was traversed by the defendant. Trial by the court, June Term, 1855,—POLAND, J., presiding.

The plaintiff produced in evidence an original note of the defendant, with the allowance of the commissioners thereon, and also a discharge of one-half of the debt by Tappan Stevens, and, in reference thereto, proved the following facts.

Soon after said allowance by the commissioners, the plaintiff sold said debt at public auction, and the same was purchased by said Stevens for himself and one Keyes for the sum of twenty dollars.

On the 4th day of August, 1847, Stevens presented the claim to the defendant, when the defendant said that he intended to have attended the sale; that Rogers owed one Tibbetts a large debt, and that he furnished Tibbetts the capital, and it all came out of him; but finally proposed to the said Stevens that he would pay him what he paid, (\$10,) and give him \$5 for his trouble, if he would discharge his half of the claim, and said that was all he could afford to pay. Stevens accepted the offer, and thereupon wrote the endorsement or discharge which appeared on said note, At the same time the defendant told Stevens, that he would give the same amount for Keyes' half, but would not give any more; and requested Stevens to make the proposition to Keyes. Stevens afterwards told Keyes what the defendant offered to do, but Keyes refused to accept the proposition.

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Upon these facts the court decided that the debt was barred by the statute of limitations, and rendered judgment for the defendant.

Exceptions by the plaintiff.

P. Dillingham for the plaintiff.

There can be no severance of a joint debt, so that a payment, part payment, admission of the debt, or new promise made to one, will not be equally good to the other, in taking the case out of the statute of limitations.

Here was a sufficient acknowledgement of the debt to Stevens, to take the case out of the statute. *Olcott v. Scales*, 3 Vt. 173.

Here was also a part payment, which would save the debt from the statute. *Strong v. Mc Connell*, 5 Vt. 338.

At all events, the offer to pay Keyes fifteen dollars, though accompanied by a refusal to pay more, removed the statute bar as to so much ; and for that the plaintiff should have recovered. *Phelps v. Stewart & Wood*, 12 Vt. 256.

A. M. Dickey and *L. B. Peck* for the defendant.

There was no error in the county court, for the testimony shows that the defendant would give \$15 to be discharged from Keyes' half of the debt, and would give no more.

In order to take a case out of the statute of limitations, there must be an acknowledgement of the debt as still due, with an apparent willingness to remain liable for it, or, at least, without an avowed intention to the contrary. Here the defendant openly declared his determination not to pay more than the \$15, saying he ought not to pay anything. *Phelps v. Stewart et al.*, 12 Vt. 256. *Carruth v. Page*, 22 Vt. 179. *Brainard v. Buck et als.*, 25 Vt. 573.

The opinion of the court was delivered by

ISHAM, J. This is an action of debt on an allowance of commissioners. The claim was allowed on the 8th of September, 1843, and a balance was found due from the defendant to the estate of Josiah W. Rogers, on which the plaintiff is administrator. To this claim the defendant has pleaded the statute of limitations.

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The question arises, whether the statute bar has been removed by a subsequent promise to pay the debt. It appears that soon after the allowance by the commissioners, this claim, together with the effects of that estate, were sold at public auction, by the administrator, to Stevens and Keyes, for the sum of twenty dollars. Under that sale, Stevens and Keyes became the joint owners of this claim.

To avoid the statute of limitations, it was proved, that on the 4th of August, 1847, Stevens presented this claim to the defendant. The defendant then proposed to pay him what he had paid for his part of the claim, being ten dollars, and five dollars in addition for his trouble, if he would discharge his half of the debt, and said that that was all he could afford to pay. The proposal was accepted by Stevens, and on the payment of that sum by the defendant, Stevens discharged him from one-half of the claim. At the same time, the defendant told Stevens that he would give the same sum to Keyes for his half of the claim, but would not give any more, and requested Stevens to make that proposition to him. The general principle governing cases of this character, is well settled in this state. To remove the statute bar, there must not only be an acknowledgement of a subsisting debt, but it must not be accompanied with any unwillingness to pay it; for an implied promise, at least, to pay the claim, is necessary to prevent the operation of the statute. On the application of this principle to this case, it is clear that the statute bar is not removed from this claim by the transaction which took place with Stevens. The proposal to pay, and the actual payment of ten dollars, was not made under those circumstances from which a promise, express or implied, can be inferred, to pay the balance of the debt; and his statement, that that was all he could afford to pay, was an express declaration of his unwillingness to pay the remainder of the claim. The proposal to pay the same to Keyes, which Stevens was authorized to make to him, was accompanied with the declaration that he would pay no more. That cannot be considered as an acknowledgement of a subsisting indebtedness on that claim, and a willingness to pay it; every feature of the testimony rebuts such an inference. It was merely an offer to compromise the matter on those terms, accompanied with an express refusal to pay any more. As Keyes re-

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fused to accept the proposal made by the defendant, the plaintiff, for his benefit, cannot recover the sum which was offered as a compromise of the matter. We think the evidence is insufficient to remove the statute bar.

The judgment of the county court is affirmed.

AMOS NOYES v. THE ESTATE OF BENJAMIN HALL.

Taxes paid recoverable in an action on book. Statute of limitations. Notes included under the term claims. Error in settlement.

The plaintiff, a constable, had for collection several taxes against the intestate, between whom and the plaintiff there were running and mutual accounts, and it was understood that these taxes should be settled for as a matter of deal and account between them in the settlement of their other accounts; and the plaintiff paid over the amount of the taxes without collecting them. *Held* that he might recover the amount so paid in an action on book account.

A mutual agreement between two persons that they will take no advantage of the statute of limitations having run upon the other's claims, but that they will thereafter settle without objection on that account, will prevent the operation of that statute; and the expression of the opinion, by one of them, that there will not be anything due from him upon such a settlement, will have no effect.

Notes held by one party against the other, would be included under the term "*claims*" in such an agreement.

Upon a partial settlement, the amount of the intestate's account was ascertained and a due-bill given for it, which included items which the plaintiff had previously paid to a third person who was authorized to receive it. *Held* that the fact of such a previous payment might be shown, and that its effect was, not to vary the operation of, or contradict the due-bill, but to establish a valid offset to so much of it.

APPEAL from the decision and report of the commissioners upon the intestate's estate. The plaintiff filed a declaration on book, and also upon certain notes. An auditor was appointed and, by agreement, all the claims upon either side were referred to his decision, and he reported the following facts in reference to the claims which were disputed.

Under his declaration on book, the plaintiff claimed to recover the amount of several taxes assessed against the intestate.

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The plaintiff was constable and collector of taxes in the town of Tunbridge, (where both parties resided,) from 1828 to 1838, excepting the year 1832; and the taxes charged, were legally assessed to the intestate, and he was liable to pay them. They were never charged to him upon any account book by the plaintiff, and no other account of them was kept by the plaintiff than retaining them upon the tax-bills, without crossing or cancelling them as he did in case of payment. The plaintiff produced the original tax-bills, showing all the taxes charged for in his account, except items No. 1 to 4, inclusive. The deceased had an accruing account with the plaintiff during all the time covered by the plaintiff's account, and it was understood by the parties that these taxes should be adjusted and settled with their other accounts, as matters of mutual deal and account, and they remained uncollected with the mutual expectation that they would be settled in that way; and the plaintiff, as collector, settled with the town and treasurer from year to year, and paid over the amount of all these taxes.

The plaintiff claimed to recover the amount of two notes, (not negotiable,) given by the intestate to the plaintiff, January 20, 1843, for \$209.19 and interest, after April 1, 1843, to which there was no objection interposed except the statute of limitations, which was urged against this and all the items of the plaintiff's account.

On the 20th day of March, 1843, the parties were together at G. Rolfe's office in Tunbridge, to settle their accounts; they looked over the intestate's accounts to that date, and agreed upon its amount at \$212.21, and not having time to complete the settlement, and adjust the plaintiff's account also, they postponed it to some future time, but wrote upon the defendant's book as follows.

"March 20, this day settled this book by due-bill to Hall, and made the same even up to this date, \$212.21.

BENJ. HALL,
AMOS NOYES;"

And thereupon a due-bill was written and signed as follows.

"\$212.21, March 20, 1843. Due Benjamin Hall, on demand, two hundred and twelve dollars and thirty-one cents to apply on settlement.

Witness, G. Rolfe.

AMOS NOYES."

And they then called Mr. Rolfe to witness that they had proceed-

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ed so far in their settlement; and as they could not finish it, the parties both agreed, and desired Rolfe to recollect that as some of their deal was outlawed, or becoming so, neither of them would take any advantage of the statute of limitations having run upon the others claims, but that they would thereafter settle without objection on that account.

The parties then separated, and each party occasionally, for some three years or more after this, asked Rolfe if he recollected, and wished him to remember their agreement in relation to waiving the statute of limitations.

The plaintiff afterwards called upon the intestate, a short time previous to the expiration of six years from the giving of the two notes of \$209, for the purpose of renewing them, and adjusting their accounts, when the intestate told him he could not then settle with him, but would when he was able, but that he should not be owing him on settlement; and the plaintiff about this time, and before the statute had run on these notes, employed Mr. Sturtevant to go and talk with the intestate about them and their accounts, and he did so; and then the intestate told Sturtevant that it would not do for Noyes to sell those notes, as he (Hall) had offsets to them, but expressed a willingness to settle, and wished Sturtevant to assist them to settle, but said he did not owe Noyes anything. This conversation was in 1848 or 1849. Some time in the spring of 1851, Andom B. Noyes, a son of the plaintiff, asked the intestate why he did not settle with his father, to which the intestate replied that he had once commenced a settlement with him, but there were some things outlawed on both sides, and they agreed not to take any advantage of the outlawing, and that he was ready to settle any time when his father was.

The principal claim in favor of the intestate, was for the amount of the above mentioned due-bill, to the allowance of which the plaintiff did not object, but claimed a deduction from, or offset to it of \$15.43, which was charged in the intestate's account for the work of one Wheeler, and included in the amount for which the due-bill was given; and in reference thereto, the following facts appeared.

The defendant owned a carding and cloth-dressing establishment, which Wheeler carried on, but on what terms or conditions, did

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not appear. Said Wheeler had the charge of the establishment, and did such custom work as was brought in; and among other things, did work for the plaintiff to the amount of \$15.43, and the plaintiff let Wheeler have such articles of provisions and produce as he wanted to some over two dollars more than Wheeler charged for the work, expecting the same to go in payment therefor, and charged the same to Wheeler on his book. Finding the work charged by the defendant, at the time of the giving of said due-bill, he objected to it, and informed the defendant that he had paid Wheeler for the sum; and thereupon the parties stopped for the plaintiff to ascertain about the charges by sending to Wheeler. The plaintiff sent a copy of his account to Wheeler, and Wheeler returned to him a receipt for the same, amounting to about two dollars more than the \$15.43, charged for Wheeler's work.

The defendant objected to the testimony in relation to the amount of the Wheeler receipt, and the agreement to deduct that amount from the \$212.21, on the ground that parol evidence was inadmissible to alter, vary, or explain the writing of the parties upon the defendants book, but the objection was overruled and the testimony admitted,

All of the foregoing items; viz, the charges for the taxes, the notes and the \$15.43, were allowed in favor of the plaintiff by the auditor and referee, and also by the county court. Exceptions by the defendant.

W. Hebard for the defendant.

The taxes charged in the plaintiff's account were not proper subjects of book account, and cannot be recovered in that form of action. There was no money or other thing delivered, for which the right to charge subsisted; *Slasson v. Davis et al*, 1 Aiken 73; *Nason v. Crocker*, 11 Vt. 463; *Carpenter v. Dole*, 13 Vt. 578.

The distinction between what may and what may not be charged on book, is to be drawn from the character, and not from the amount of the deal; *Leach et al v. Shepard*, 5 Vt. 363.

These taxes were never charged to Hall; and if Mr. Hall was ever liable to him on account of these taxes, it must be established in some common law action.

The whole account, on both sides, is outlawed. A promise to

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waive the statute would only amount to a new promise, and would run but six years; *Munson v. Rice*, 18 Vt. 53.

To take the debt out of the statute by an acknowledgment, there must be no expressed unwillingness to remain liable for the debt; *Phelps v. Stewart et al*, 12 Vt. 256.

Hall on every occasion protested that he was not owing Noyes. When the defendant denies his indebtedness, it is virtually denying the justice of the claim; and in such case, an agreement not to take advantage of the statute is not a sufficient acknowledgement to avoid the operation of the statute; *Carruth v. Paige*, 22 Vt. 179.

But whether the acknowledgement was sufficient to remove the statute bar in relation to the account or not, it could have no such effect upon the notes.

The only evidence of a new promise in relation to the notes, came from Mr. Sturtevant. Hall said to Sturtevant that "it would not do for Noyes to sell those notes, as he had an offset against them;" equivalent to saying "they are paid." This is the same doctrine contained in *Carruth v. Paige*, above cited.

The item of \$15.43 was improperly allowed.

G. Rolfe and *C. M. Lamb* for the plaintiff.

The facts found by the auditor and referee bring this case within the rule established by numerous authorities in this state, that an admission of a present indebtedness, or an acknowledgment of subsisting demands, or the expression of a willingness to settle and adjust existing accounts and demands, is equivalent to a promise to pay, and thus takes the case out of the operation of the statute of limitations; *Olcott v. Scales*, 3 Vt. 173; *Burlow v. Belamy*, 7 Vt. 54; *Phelps v. Stewart*, 12 Vt. 256; *Blake v. Parleman*, 13 Vt. 574; *Chapin v. Warden*, 15 Vt. 560; *Minkler v. Est. of Minkler*, 16 Vt. 194; *Carruth v. Paige*, 22 Vt. 179; and in such case, the opinion, belief, or protestation even, of the party promising, that he does not owe, will not alter his liability in this respect; *Williams v. Finney*, 16 Vt. 297; *Paddock v. Colby*, 18 Vt. 485; *Burton v. Stevens*, 24 Vt. 131; *Cooper v. Parker*, 25 Vt. 502.

The plaintiff's claim for the amount of the Wheeler receipt was properly allowed. From the facts, as detailed, the auditor must

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have found that the defendant had no right to claim this of the plaintiff, and that the defendant agreed to deduct it from the amount minuted on the defendant's book, on the production of a receipt from Wheeler; and the county court in accepting the report, must have found the same facts directly, or must have inferred such facts from matters stated by the auditor and referee in his report, and their judgment therein will not be disturbed in this court; *Stone et als v. Foster*, 16 Vt. 546; *Birchard et al v. Palmer*, 18 Vt. 203; *Barber v. Britton et al*, 26 Vt. 112.

The tendency of the testimony was not "to alter, vary or explain the writing of the parties," but to prove an independent fact; that is, an agreement to refund the amount on producing Wheeler's receipt, which amount the defendant was not entitled to retain; 1 Greenleaf's Ev. Sec. 284.

* The opinion of the court was delivered by.

BENNETT, J. We see no reason why, from the facts reported, the plaintiff may not recover, in this form of action, for the amount of the monies paid by the plaintiff for the taxes which he had in his hands, for collection, against the intestate. There were all the time mutual and running accounts between the parties, and the case finds that it was understood between them that the taxes should be adjusted and settled with their other accounts, as matters of mutual deal and account.

We think the defense set up under the statute of limitations can not succeed. In March, 1843, the parties commenced a settlement of their dealings, and found the amount of Hall's claims against the plaintiff to be \$212.21, and, not having time to complete the settlement, the plaintiff gave the intestate his due bill for that sum, to apply on settlement, and it was then agreed that "neither party would take any advantage of the statute of limitations having run, or being about to run upon the other's claims, but would thereafter settle without any objection on that account." It is evident, from the facts reported, which may be referred to, that this agreement was kept upon foot by the parties, at least down to the spring of 1851, when Hall said to the plaintiff's son that he and the plaintiff had a settlement to make, and that there were some things outlawed on both sides, but they had agreed to take no ad-

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vantage of the statute of limitations, and that he was ready to settle at any time. The notes in question are included in the term claims, and were clearly within the agreement of the parties, excepting them from the effect of the statute of limitations. The opinion that Hall may have expressed that he should not be owing the plaintiff upon a final settlement, cannot have any effect upon the agreement to waive the statute.

We think the item of \$15.43 in the plaintiff's account, should be allowed him, notwithstanding the same sum was included in the intestate's account, and went to make up a part of the \$212.21, for which the due-bill was given. This item of \$15.43 was for carding wool and dressing cloth, done by one Wheeler, in the employ of Hall; but it is found that the plaintiff, from time to time, let Wheeler have produce, expecting that it would go in payment of this account, and charged the same to Wheeler.

When the parties suspended their settlement, the auditor finds that the plaintiff objected to this item in Hall's account, upon the ground that he had paid it in produce to Wheeler, and the settlement was delayed to ascertain how that fact was. In doing this, there was an implied admission by Hall that Wheeler had the right to receive pay, and the plaintiff might transfer his account against Wheeler to his account against Hall. At the time the due-bill was given, this charge of \$15.43 was a subsisting item in Hall's account, and the charge of the plaintiff, though made to Wheeler, was a subsisting account, to be applied in payment, and both were kept upon foot, subject to a future application. The effect of the finding of the auditors was not to contradict or vary the operation of the due-bill, but to set up a subsisting item in the plaintiff's account, which would, in effect, balance so much of Hall's account embodied in the due-bill. This being the effect of the finding of the auditor, I see no reason why we should not give it full operation.

Judgment affirmed.

Shedd v. Powers.

WILLIAM R. SHEDD v. JOHN POWERS AND JOHN POWERS, JR.

Constructive possession.

A constructive possession limited to the bounds given in the deed under which the party claimed, and not extended to an old line beyond, to which, for a part of the distance, there had been more than fifteen years actual occupancy.

TRESPASS for cutting timber. The cause was referred, and, before the referee, the only question was whether the cutting complained of was on lot No. 137, in ———, owned by the plaintiff, or on lot No. 136, which lay south of and adjoining No. 137, the north part of which was owned by the defendants.

There was no dispute as to the north-east, south-west and south-east corners of lot No. 136, but there was as to the north-west corner. The plaintiff claimed that a maple tree, at the point C, as indicated on a plan attached to the referee's report, was the corner; while the defendant claimed the corner to be at the point B, on said plan. The cutting was at the west end of the strip of land between the lines A B and A C,—A being the conceded north-east corner of lot No. 136, and A B its north line, as claimed by the defendants, and A C the north line, as claimed by the plaintiff, as indicated on said plan.

On the 9th of December, 1818, one Samuel Powers was in possession of and owned lot No. 136. On that day he conveyed, by deed, to John Powers, one of the defendants, sixty acres from the north side of the lot; and immediately after the execution of that deed, the said Samuel and John, the grantor and grantee, run out said sixty acres, marking the maple at C, as the north-west corner of the lot, and of the sixty acres. The defendants claimed to extend his line to B, which was some eighteen rods north of C, and would give him about seventy-one acres.

When that part of the town in which these lots are located was divided into severalty, and these lots run out, the range lines only were run, which were the north and south lines, and the corners marked. The defendants proved that between sixty and seventy years ago a line was run and marked from A to B, which the referee found was run as and for the dividing line between lots Nos. 136 and 137, which were one hundred acre lots. Soon after the execution of said deed of December 9th, 1818, the defendant John

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Powers, senior, commenced clearing in the north-east corner of lot No. 136, and more than fifteen years prior to the commencement of this suit had cleared up to the line A B, which was spoken of as the spotted line, for some fifty or sixty rods west from the north-east corner, and had ever since occupied up to said line the distance so cleared, claiming that to be the true line. This clearing did not extend so far west, by many rods, as where the trespasses complained of were committed. The north-westerly part of lot No. 136 and the south-westerly part of 137 remained wooded and unenclosed. The plaintiff claimed that the maple was the true corner of these lots, and the referee found it to be the corner as originally marked.

The spotted line, after it leaves the cleared land, runs quite a distance in the woods before it intersects the range line, and in reference to this portion of the line and the north-west corner of lot No. 136, within fifteen years next before the commencement of this suit, the defendant Powers, senior, said to the plaintiff's grantor that he wished to agree upon and establish the line and corner between them.

Whether, under the circumstances and facts above stated, the maple corner (C) or the spotted line (A B) should settle the rights of the parties, the referee referred to the court. If the maple corner governed, he found for the plaintiff to recover \$20 damages, and his costs, but, if the spotted line governed, he found for the defendants to recover their costs.

The county court, ——— Term, 185—, rendered judgment on the report of the referee, in favor of the plaintiff.

Exceptions by the defendants.

P. T. Washburn and J. Potts for the defendants.

The spotted line has become, and is the division line between the lots. This cannot be disputed, so far as the clearing extends, by reason of the defendants' actual occupancy and claim of title.

And beyond the clearing the defendants have had a constructive possession, which, by acquiescence and lapse of time, has become a title. This constructive possession operated a disseizin of the owners of lot No. 137, even if that lot originally extended south of the spotted line, and its continuance for fifteen years has per-

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fecting a title in the defendants; *Whitney v. French*, 25 Vt. 663; *Swift v. Gage*, 26 Vt. 228; *Buck v. Squiers*, 23 Vt. 499; *Crowell v. Bebee*, 10 Vt. 35; *French v. Pearce*, 8 Conn. 439; *Spaulding v. Warren*, 25 Vt. 321; *Fitch v. Mann*, 8 Barr 503.

Even if the plaintiff have title to the *locus in quo*, the report shows no possession in him, and therefore he cannot maintain trespass; *Wheeler v. Hotchkiss*, 10 Conn. 225. And, if trespass will lie, the plaintiff can only recover nominal damages for the disseizin; *Stevens v. Hollister*, 18 Vt. 294.

A. M. Dickey for the plaintiff.

The fact that the defendants cleared down to the spotted line at one corner, and occupied to that line, over fifteen years, would not give him possession, constructively, to that line the entire length of the lot; he could acquire a title by possession to no more than he actually enclosed and occupied, for his deed only carried him to the maple tree; *Chandler v. Spear*, 22 Vt. 388.

The report shows that there never was any adverse possession of the premises in question, for it finds that one of the defendants, within fifteen years, applied to the plaintiff's grantor to go and agree with him (the defendant) and establish that corner and the true line of these lots.

There was no mutual recognition of the spotted line as the true line between these lots, by the plaintiff and plaintiff's grantor, and the defendants, and, therefore, it cannot govern.

The opinion of the court was delivered by

REDFIELD, CH. J. This is a case where there is considerable ground for debate in regard to the extent of the defendant's possession upon lot No. 186. But as the referee finds that the true corner was at the maple tree, and that the defendant's deed was, in fact, only intended to convey the land to that corner, we must, we think, regard the constructive possession as limited to the actual limits of the lot. The deed only described sixty acres in the north part of the lot. The lot, in fact, only extended to the line "A. C." Whatever possession the defendant had beyond the actual limits of the lot, he must have obtained independent of his deed. His acts, so far as they can be, should be referred to his deed. And,

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the deed, being upon record, was distinct notice to everybody that he did not claim beyond his deed.

The line from A to B being marked "as and for the dividing line," does not show that these parties so regarded it. There is nothing in the case to show that the defendant so regarded it, except his claiming up to it, at the east end, where it nearly coincided with the true line, and the difference might not, at first, have been noticed. And, taking all the facts proved, it does not seem very obvious that the plaintiff would be bound to regard the defendant as ever claiming this spotted line as the true line. And, when it is considered that, within fifteen years, the defendant admitted the north-west corner was not established, and said "he wished to agree upon and establish the line and corner between" him and the plaintiff's grantor, we must conclude there is not enough in the case to show a marked and intelligible claim of possession and property in the land, as far as the spotted line.

We have no doubt one may have constructive possession of land, independent of paper title or claim, and without the literal *possessio pedis* upon any part of the land. But it should be marked by unmistakable *indicia* of claim, of use and right to control. A fence is always sufficient for this purpose. A mere marked line has not, of itself, been yet held sufficient. But in the absence of all paper title, probably it might be so made as to be equally indicative of claim of title, without any other monument. But where there is paper title, as in the present case, it requires very distinct occupancy to extend the possession beyond the limits described in the deed, inasmuch as the deed, while it is notice of claim to the extent of the boundaries therein set forth, is also a distinct disclaimer of any further pretensions. The owner of the adjacent lot is then put off his guard, as to any merely equivocal acts. He is naturally led to put the most favorable construction upon them as explained by the deed. In this view, we think there was nothing which amounted to constructive possession of the land in dispute.

Judgment affirmed.

Cushman v. Estate of Hall.

BENJAMIN H. CUSHMAN, *Apt. v.* THE ESTATE OF BENJAMIN HALL.

Payment. Evidence.

Articles delivered strictly in payment or part payment of a note, if they are not applied, and the whole note is subsequently otherwise paid, cannot be recovered for in an independent action; but if, at the time of their delivery, it is understood that there is to be a future adjustment in reference to them before their application, and the note is subsequently paid before such an adjustment, and without any application of them, they may then be independently recovered for.

In the present case 125 bushels of potatoes, which, it was understood were to be endorsed on the note, were delivered in different parcels and at different times, and the holder of the note entered the different parcels or loads upon his book, as they were received. *Held* that this tended to show that an application on the note of each load as received was not intended, and that an adjustment and application was to be made after the whole were delivered.

APPEAL from the decision and report of commissioners upon the intestate's estate. The appellant filed a declaration in assumpsit upon the general counts. The nature of his claim, the facts and testimony in reference thereto, the questions involved, and the proceedings of the county court thereon, sufficiently appear in the opinion, which, after argument by

W. Hebard for the defendant.

and by

C. M. Lamb for the plaintiff

was delivered by

ISHAM, J. The plaintiff seeks to recover payment for 125 bushels of potatoes which were delivered to the defendant in the fall of 1842, in part payment of a note which Hall then held against him. The plaintiff afterwards renewed the note, and has since paid the renewal note, without any application of that payment. No indorsement for that matter was made on the note, and the claim was forgotten when the note was renewed, and when the renewal note was paid. The question now arises, whether that is a claim for which the plaintiff can recover in this suit. The court charged the jury that if the potatoes were delivered by the plaintiff

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and received by the defendant, in present part payment of the note, and nothing more remained to be done in relation to their adjustment and application upon the note, the plaintiff could not recover for them, even if they were not applied. This general principal is fully sustained by repeated decisions in this state. *Stevens v. Tuttle*, 8 Vt. 519. *Durrill v. Lawrence*, 10 Vt. 517. *Corey v. Gale*, 13 Vt. 639. It is immaterial whether the note has been sued and judgment recovered upon it, or whether it has been paid without suit; such payments are matters of defense, and constitute no debt or claim for which an action can be sustained. That general rule, however, has been qualified in its application to cases where an account was contracted, and the parties contemplated a subsequent adjustment and future application on the note. In such case, the party has been allowed to sustain his action for the recovery of those matters, if the note has been paid without the application of that account. *Strong v. McConnell*, 10 Vt. 231. *Brooks v. Jewell*, 14 Vt. 473. That rule was adopted by the court on the trial of this case. In their charge to the jury, the court instructed them that if they found that the potatoes were delivered in several parcels and at different times, and that it was understood between them that there was to be a future adjustment of the account before the application was made, and that an account was kept for that purpose, that the plaintiff would be entitled to recover in this suit. The jury, by their verdict, have found that the potatoes were delivered in that manner, and that an account was kept for future adjustment and application; and, as the note has been otherwise paid, the plaintiff is entitled to recover, if the matter was properly submitted to the jury. If testimony tending to prove these facts was given in evidence, the case was not only properly submitted, but their verdict is conclusive upon these facts, as they are the exclusive judges of its sufficiency; but if no such testimony was in the case, the court should not have submitted that question to their consideration. On that subject, it appears that the only proof of the delivery of the potatoes was the deposition of Solomon Cushman, the plaintiff's son, the plaintiff himself, and an account-book kept by Hall, containing, in his own handwriting, the original entries of the potatoes, as they were delivered. The book bears intrinsic evidence that it was kept for the purpose

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of entering the quantity of potatoes which were received by him from every source, for the purpose of manufacturing them into starch. The deposition of Solomon Cushman, not having been produced at this hearing, is laid out of the case. The plaintiff testified that he had forgotten about the potatoes, until he saw them on Hall's book; that he recollected delivering them, and that Hall agreed to endorse them on the note. This testimony has a tendency to show that the potatoes were delivered to apply on the note, but it falls short in proving, or tending to prove that they were delivered for future adjustment and application. The important testimony in the case, on this subject, is the book account kept by Hall. From that book it appears that the potatoes were delivered in different parcels and at different times, from the 22d to the 24th of October, inclusive. It tends to prove that an application on the note was not to be made as each load was delivered, but that an account was to be kept, and the application made after the whole quantity had been received. Whether the book was kept for that, or any other purpose, was a proper subject of inquiry by the jury. We think, from these circumstances, that there was testimony in the case which warranted the court in submitting that question to the jury; and their verdict is conclusive in the case.

The judgment of the county court is affirmed.

MOSES BROCK v. SAMUEL EASTMAN.

Petition for partition.

To sustain a petition for partition the petitioner must have some greater present interest in the premises than a mere right of entry. If the defendant's possession amounts to a disseizin of the petitioner, and the premises were never held by them together, a petition for partition cannot be sustained.

The petitioner had levied upon an undivided portion of the defendant's interest in a piece of land, which the defendant remained in possession of, denying the petitioner's right to any participation therein under his levy. *Held*, that the defend-

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ant's possession of the premises was not such a seizin of them, as tenant in common with the petitioner, as would enable the latter to sustain his petition for partition.

PETITION FOR PARTITION, to which the defendant plead several pleas in bar, the first of which was that the defendant was seized and possessed of the premises referred to in his own right, "without that, that the said petitioner was, and is seized of any part thereof as tenant in common, as in his petition he hath alleged."

Upon the trial, it appeared that the defendant, on the 30th of December, 1850, was the owner of a piece of land, including the premises of which a partition was petitioned for, which, at that date, he mortgaged to Samuel A. and Thomas L. Tucker, with an exception in the following words, "saving always the homestead exemption in the same." The petitioner subsequently attached the premises on a writ in his favor against the defendant, upon which he subsequently obtained a judgment and took out an execution, which he levied upon the premises of which a partition was petitioned for. Various questions were raised in reference to the sufficiency of the petitioner's levy, the extent and meaning of the above exception in the mortgage, and the defendant's right to a homestead in the premises, which, under the decision of the supreme court, it becomes unnecessary to state more particularly. It also appeared that the defendant was the sole owner of the premises at the time he mortgaged to Tucker, and that he had always remained in the sole possession of the premises, claiming adversely to any title of the petitioner under his levy. The county court, June Term, 1855,—POLAND, J., presiding,—dismissed the petition, to which the petitioner excepted.

R. McK Ormsby for the petitioner.

That the petitionee claims to hold adversely is no bar to partition; *Aldis v. Burdick*, 8 Vt. 21; *Hawley v. Soper*, 18 Vt. 320.

C. B. Leslie for the defendant.

The object of the statute under which this petition is brought, is to turn an estate holden in common, and undivided, into one in severalty; and not to determine conflicting titles thereto. The petitioner has never been in possession, and the premises have always been held adversely to him. He should, therefore, have brought

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ejectment; Co. Lit. 167, § 247; 7 Mass. 475; 13 Pick. 251; 9 Cow. 530; *Hawley v. Soper*, 18 Vt. 320; 1 Swift's Dig. 103.

The petitioner must have a present, actual possession; a mere *right of entry* is not sufficient; 9 Cow. 530.

The opinion of the court was delivered by

BENNETT, J. We think there is one point in the case which is fatal to the plaintiff's petition, and none other need be considered. The first plea puts in issue the seizin of the defendant, as tenant in common with the petitioner; and the exceptions find that the defendant was the sole owner of the premises at the time he executed his mortgage to the Tuckers, in 1850, and that he has ever since been in the sole possession of the premises, claiming adversely to the petitioner under his levy of execution. The object of the proceeding in a petition for partition is to turn an estate that is possessed in common into an estate in severalty, and not to furnish a mode of settling conflicting titles. It is a general rule that a petition for partition cannot be sustained on a mere right of entry. But there is a distinction between a mere possession of the plaintiff's share by a third person or by the defendant, and a legal disseizin. In cases where a *privity* has existed between the parties, as in the case of joint tenants, or tenants in common, and one tenant ousts his co-tenant, by taking the whole profits to himself, denying his co-tenant's right, such a possession may be treated as a disseizin, for the purpose of bringing ejectment; or, he may elect to treat such possession of his co-tenant as his possession, and, in that event, may maintain a petition for partition. See *Clapp v. Bromagham*, 9 Cowen 566; *Barnard v. Pope*, 14 Mass. 434; *Hawley v. Soper*, 18 Vt. 323. But it would seem, from the authorities, if the party in such a case is *effectually disseized*, they no longer hold the estate together, and he is barred of his remedy for partition; Coke Lit. 167; 5 Comyns 166; 1 Swift's Dig. 103. But the case now before us is one where the parties never held the estate together. There was no privity between them. The defendant held the whole estate from the time of the commencement of the plaintiff's claim *adverse* to him.

If the plaintiff's levy was valid, it could only give him a right of entry, and would not enable him to sustain this proceeding.

Judgment affirmed.

Griswold v. Clark.

AHIRA GRISWOLD v. EBENEZER CLARK.

Discharge of note by executors.

The plaintiff and two others were executors of the last will of his father, who before his decease held a note against the defendant, which he placed in the hands of the plaintiff for collection; and the plaintiff subsequently took a new note, upon which he commenced the present suit, in his own name, as its bearer, after which the defendant paid the amount due upon it to the other executors, and obtained their discharge, they knowing of the suit, and agreeing to indemnify the defendant against it. *Held* that the note was under the control of the executors, and that the discharge of a majority of them was a valid defense.

ASSUMPSIT. The suit was commenced by the plaintiff as the bearer of a promissory note, in reference to which it appeared, that John Griswold, the father of the plaintiff, deceased in December, 1851, owning a note against the defendant, which he had placed in the plaintiff's hands for collection; and that by his will he appointed the plaintiff, Loren Griswold and John Griswold the executors thereof, which trust they accepted; and that they were the residuary legatees; and that the note in suit was subsequently given for the one belonging to the testator, and that both the old and new note remained in the plaintiff's hands until this suit was brought. After the plaintiff had commenced this suit, the defendant paid the amount of the note to Loren and John Griswold, without any cost, and they gave him a discharge, and agreed to indemnify him from all costs of the suit,—all of them knowing that the note was then in the plaintiff's possession. Previous to this payment, the plaintiff and John and Loren had looked over the collections and receipts of moneys of the estate by each, but they had not come to a settlement; and it was claimed by Loren and John that the plaintiff had received more than his share by some \$600, but the plaintiff claimed that they were about even. Before the commencement of the suit, Loren and John told the defendant that he might pay the note to John, when he did pay; and they also told him that he might delay the payment to a time subsequent to the commencement of the suit; and before the suit was brought, the plaintiff was informed by Loren, that they (Loren and John) had so told the defendant. It appeared that the plaintiff repeatedly called on the defendant for pay on the note, and did so on the day, or day but one before the suit was brought.

Upon the foregoing facts the county court, January Term, 1856,

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—UNDERWOOD, J., presiding,—rendered judgment for the defendant, to which the plaintiff excepted.

W. Hebard for the plaintiff.

This note had always been in the plaintiff's hands, and was taken by him, and this was known to the defendant.

The plaintiff being the *bona fide* holder of the note, he becomes the legal bearer of it, and liable for costs; his suit could no more be defeated by a payment to a third person claiming an interest in the note, than by pleading an offset against the real owner of a note, sued in the name of an endorsee or bearer. *Potter v. Bartlett*, 6 Vt. 248. *Adams v. Bliss*, 16 Vt. 39. *Phelps v. Bulkley*, 20 Vt. 17. *Rix, admr. v. Nevins*, 26 Vt. 385. *Littlefield v. Story*, 3 Johns. 421. *Raymond v. Squire*, 11 Johns. 47. *Tuttle v. Bebee*, 8 Johns. 152. Am. Com. L. 230,

Suppose the defendant, instead of paying the money to the said John and Loren, had made a tender of the amount due. Would that have defeated the plaintiff's action? Most surely not. *Tarbell v. Sturtevant*, 26 Vt. 513.

A payment could have no greater effect than a tender, and neither could have any effect, unless made to the right man.

P. Perrin for the defendant.

This note was in the plaintiff's hands as one of the executors, and he held it only in that capacity, and not in his own right.

The note was the property of the estate, and should have been sued in the name of all the executors. *Sherwood v. Roys*, 14 Pick. 172. *Baxter's Admr. v. Buck*, 10 Vt. 548.

A majority of the executors had appropriated the avails of this note before suit, and of this the plaintiff had notice, and a majority of the executors had a right to control the disposition of the note, or extend the time of payment.

Either executor has the right and power to receive and execute a discharge of a suit, and, clearly, a majority can do so, and, if justice required, indemnify the defendant against costs. *Gleason v. Lillie*, 1 Aik. 28. *Wheaton's Selwyn* 783 and notes.

The opinion of the court was delivered by

ISHAM J. The note on which this action is brought belongs to

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the estate of John Griswold. The fact that it was given in renewal of another note, which was left with the plaintiff by his father for collection, does not alter the legal title to it. The note was payable to his father, and belonged to his estate. When the plaintiff sued the note in his name, he stood as trustee for the estate, and any payment made to the estate, or to those representing it, was a good discharge of the note, as the plaintiff had no interest in it but as one of the executors, and as one of the residuary legatees. The note and its avails were assets belonging to the estate, and, until the estate was settled and the property divided, it was under the control of the executors, and payments made to, and releases executed by them, or a majority of them, is a good discharge of the claim. The judgment of the county court is affirmed.

BENJAMIN F. ABBOTT *Administrator of* LESTER ABBOTT *v.*
NEWELL COBURN AND CAROLINE COBURN *his wife; ABEL*
LYMAN, *trustee.*

Administrator. What choses in action recoverable by.

The jurisdiction of a probate court, in granting administration, cannot be collaterally attacked.

Debts due to a deceased person can be collected and administered upon, in the first instance, only in the state where the debtor resides. If paid to another administrator, the payment will be no protection against a suit in favor of an administrator appointed in that state.

If an intestate did not reside in this state at the time of his decease, money due to him from, or money belonging to his estate which is paid to a person who does not reside in this state, cannot be recovered of such person in an action brought by an administrator appointed here.

The debtor or person receiving the money would only be liable to an action in favor of an administrator appointed in the state of the residence either of the debtor or intestate.

ASSUMPSIT. The parties agreed upon the following statement of facts.

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The intestate, Lester Abbott, about the year 1845, removed from Brookfield, in this state, to Lowell, Mass., and there resided till December, 1848, when he went to California, leaving his wife and child in Lowell. The said Lester died in California in the summer of 1850, leaving a small amount of property which, soon after his death, one John Hutchinson collected together and converted into money, and, after paying what few debts the said Lester was owing there together with the expenses of his funeral and of looking up the property, the balance, amounting to two hundred and thirty-five dollars, he transmitted to the defendant Caroline, who was then the widow of the said Lester, by one Henry Cooley who was then returning to Vermont. The money was delivered to the said Caroline, by Cooley, sometime in the spring of 1851; and she gave her receipt for the same, and loaned it, with some more which she then had, to the plaintiff Benjamin F. Abbott, for which he gave her his note dated the first of April, 1851. The said Lester, before going to Lowell in 1845, disposed of all his property and never afterwards resided in Vermont; but after he went to California, the defendant Caroline came back to Brookfield with her child in the spring of 1849, and there remained till the spring of 1850, keeping house a part of the time, and then returned to Lowell where she has resided ever since.

The defendant Caroline sued said note and, at the June Term of the Orange county court, 1852, obtained a judgment upon it, and put the execution into the hands of the trustee, a deputy sheriff, who collected the money of the said Berj. F. the day that this writ was served upon him as trustee, which was the 24th day of September, 1852.

On the 9th day of September, 1852, the said Benjamin F., was appointed administrator of the estate of the said Lester Abbott by the probate court for the district of Randolph in this state.

The defendants were married on the 24th of June, 1852, at Northfield in this state; and the next day, or next day but one, they returned to Lowell, where both of them resided at, and before said marriage, and where they both have resided ever since.

At the time of his death, and the granting of the said letters of administration, the said Lester Abbott had no known property, and

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never had had any in this state after his removal in 1845, excepting the money so sent by Cooley.

There was no administration upon the estate of the said Lester in the state of California. At the time of the service of the writ in this case the defendants were neither of them in this state.

The said Lester Abbott was owing debts in this state which have been presented to and allowed by the commissioners on his estate; but no property of his has been found or appraised, and the appraisers have made no report.

Upon the foregoing statement of facts, the county court, January Term, 1856,—UNDERWOOD, J., presiding,—rendered judgment for the plaintiff. Exceptions by the defendants.

W. Hebard for the defendants.

The facts admitted, show that the probate court had no jurisdiction of this case, and consequently could not clothe the plaintiff with any power to act in the capacity of administrator.

1st. Lester Abbott was not an inhabitant of this state at the time of his death, but was an inhabitant of *California*, and died there.

2d. At the time of his death he had no property in this state, and had had none since he ceased to be an inhabitant, which was in 1845. There consequently was nothing for the law to act upon; and the doings of the court, in appointing the plaintiff administrator, was a nullity.

The want of jurisdiction appearing upon the record, and agreed to in the statement of facts, it may be inquired into collaterally; Comp. Stat. p. 323, Sec. 18; *Lawrence v. Englesby*, 24 Vt. 43.

The probate court is a court of special and limited jurisdiction, and derives all its powers from the statute; and when it exceeds the authority conferred by the statute, its acts are all void; *Clapp v. Beardsley*, 1 Aiken 168; *Hendrick and others v. Cleavland*, 2 Vt. 329.

The plaintiff, in this case, is what is termed a foreign administrator.

The principal administration would be in California where Lester Abbott died, or in Massachusetts where his family resided at the time of his death.

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The matter sued for in this writ is a *chose in action*, and the debtor resides in Massachusetts, and whether administration has been taken out there or not does not affect the question.

"The administrator here has no control over choses in action, when the debtor resides out of the state;" *Admr. of Bullock v. Rogers*, 16 Vt. 294.

The plaintiff could have given no discharge of this debt which would be available in Massachusetts when the administrator there should sue for this debt; *Vaughn v. Barret*, 5 Vt. 333; *Lee v. Haven*, Brayt. 93; *Dodge v. Wetmore*, Brayt. 93; *Stearns v. Gaylord*, 11 Mass. 256; *Goodwin v. Jones*, 3 Mass. 514.

Property remitted from one jurisdiction to another, an administrator appointed in the jurisdiction to which the property is remitted cannot assert a claim to it; Story's Eq. Jurisprudence, Vol. 1 Ch. 9, Sec. 584; Story's Conflict of Laws, Sec. 518.

P. Perrin and J. P. Kidder for the plaintiff.

1. The judgment of the probate court, in granting administration, is conclusive as has often been decided by this court; and the statute, p. 323, Sec's. 17 and 18, makes it so also; *Driggs, Admr. of Rhoda Kinney v. Abbott*, 27 Vt. 580; *Sutton v. Sutton's Estate*, 13 Vt. 71; *Giddings et al v. Smith et al*, 15 Vt. 344.

2. The statute, p. 257, Sec. 11, certainly contemplates the bringing of actions by trustee process, when the debtors reside out of this state, and prescribes the mode of service in such cases; and such actions have been repeatedly sustained in this state, even where both plaintiff and defendant resided out of the state. See statute, p. 243, Sec. 10; *Twombly & Sax v. Clark & Tr.*, 13 Vt. 118; *Chase et al v. Houghton et al & Tr.*, 16 Vt. 594; *Ward & Co. v. Morrison & Tr.*, 25 Vt. 593.

3. The statute treats the service of a trustee process as an effectual attachment of the defendant's property in the hands of the trustee; statute, p. 257, Sec. 11.

4. The object as well as the necessity of bringing this suit here was to secure the debt by trustee process, and this could not be effected where the debtor then resided, as the trustee resided in this state.

5. The attachment in this case was made in accordance with

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the statute. The property attached came into the hands of Mrs. Coburn in this state. It went into the hands of the trustee in this state. The implied promise to pay was in this state, and the defendants resided in this state when the property went into Mrs. Coburn's hands.

6. The goods and estate came to the hands of the administrator, (plaintiff,) by relation, back to the time that Mrs. Coburn received them, and not at the time of the decease. It was when all the parties resided in this state, and we insist that the suit was properly brought here; *Welchman Admr. v. Sturgis*, 66 C. L. 552.

7. The parties in this case have appeared by themselves and their attorneys, and submitted themselves to the jurisdiction of the courts of this state.

The opinion of the court was delivered by

REDFIELD CH. J. In regard to the jurisdiction of the probate court, to grant administration in this state, we think the case comes within the general principle so often announced, that it cannot be attacked collaterally, but the question must be raised, by some proceeding before that court in the first instance, which could only be revised in this court by appeal to the county court, and exceptions or writ of error to this court. The consideration that the facts are agreed upon in this case, can make no difference. The proceeding is not in the proper court for the testimony to operate, otherwise than collaterally.

But we do not see but the same question virtually arises in regard to the plaintiff's right to recover this money of the widow of the deceased; i. e., if this is all the estate there is in this state.

The proper place for the principal administration in this case, is undoubtedly not here. It is either in California, or in Massachusetts, in one of which places the intestate had his residence at the time of his decease. This money should have been administered either in one or the other of those states. And the fact that no administration has yet been taken in either of those states, will make no difference, as that may be done hereafter. We should probably be bound to decide this question the same as if an administration existed in Massachusetts, and a suit were there pending for this same money.

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It is well settled that if the debtor resided in this state at the time the money was received, as she did in Massachusetts, that any discharge of a foreign administrator could not affect the right of the administrator in this state to recover the debt; *Vaughn v. Barrett*, 5 Vt. 333, and cases there cited.

In regard to the principal administration, it seems to be well enough settled in some states, although the rule may not be settled here, that assets brought from a foreign jurisdiction into the one of the domicile of the intestate, are to be there administered. These funds then did properly belong to the jurisdiction of California or Massachusetts, and should have been there remitted, and administered.

The intestate had his residence in Massachusetts up to December, 1848, and left his wife and child there when he went to California; and there is nothing in the case to show that he ever changed his residence to any other place. It is obvious he had no residence in Vermont at the time of his decease. His wife could not change his residence here, in his absence, and without his consent, and she returned to Massachusetts in the spring of 1850, "where she has ever since resided," as the case states. So that Massachusetts is probably to be regarded as the place of the domicile of the intestate, at the time of his decease, and was clearly the place of residence of this debtor, at the time she received the money.

The funds, then, which were collected in California, should have been remitted to Massachusetts and there administered, or else retained in California; and as the widow then resided in Massachusetts, we think paying them to her, whether the act was done in that state or in this, is to be regarded as remitting them to the place of the domicile of the deceased, and that they are not liable to be administered in this state, or in any other place out of Massachusetts, unless in California.

It is well settled that choses in action belonging to the deceased are, for this purpose, to be regarded as having their situs in the place of the residence of the debtors. That was the rule of the common law, as to simple contract debts; *Carthews* 373; *Salkeld* 37; *Lord Raymond* 562. And any discharge in regard to these funds out of California where they were at the decease, unless in

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the place of the domicile of the deceased, at his death, will be altogether unavailing. It is settled in this state by the cases referred to, beyond all question, that the release of the plaintiff for these funds would be no discharge either to Hutchinson, who collected them, or to Cooley, who brought them out of California, or to the defendants who received them. And by parity of reasoning, as we think, a judgment in his favor would have no greater effect. That could only extend to the merger of *his* rights. And if he had no right to the funds, the judgment could not affect the rights of an administrator in Massachusetts where the debtor resides. Unless, then, the funds have been remitted to the place of the domicile of the deceased, which Vermont clearly is not, all who have had any agency in collecting or transmitting them are liable to the suit of an administrator, either in Massachusetts or California, according to the case of *Welchman v. Sturgis*, 66 Com. L. 552; and *Bullock Admr. v. Rogers*, 16 Vt. 294. And any judgment we might here give would afford no protection against such suit. For if the defendants are liable here, because the money was received here from Cooley, which does not appear, but may be true, then Cooley is liable here also for paying it over, as was held in the English case last cited, and he is equally liable in every state through which he carried the money. And if the defendants are liable here, so are they equally in New Hampshire, if they carried the money from this state to Massachusetts. But, according to the case in 66 Eng. Com. Law R., Hutchinson is liable as for a tort, as executor de son tort, for collecting these funds; and it is only by waiving the tort, that any action for the money lies. But it is questionable whether that rule will apply indifferently to all persons to whom that money came, as money has no ear mark, and is incapable of being identified. For Hutchinson's paying over the money did not release his liability. He is still liable for all the money he collected, and cannot deduct even the debts which he paid for the estate. And the persons of whom he collected the money were not discharged of their obligation to the estate by payment to him, unless he remitted the money to the rightful administrator in the place of the domicile. And if Cooley were ever liable, his paying over the money to the widow will not release him until she remits the money to the rightful administrator in the place of domicile.

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That, then, is the duty of Hutchinson, Cooley and the defendant Caroline.

A debt, by the decease of the creditor, becomes *bona notabilia*, or assets in the place of residence of the debtor ; and, according to our decisions, no one but an administrator in that state can collect it, or release it, or properly administer it. It is no longer transitory, as before the decease of the creditor, but becomes local, and is confined to the probate jurisdiction of the debtor's residence, unless it be remitted to the administrator of the place of the domicile of the deceased, as is held in some states ; but that is no discharge here, I think. That is the very point decided in *Bullock Admr. v. Rogers*, 16 Vt. 294. That action, it is expressly decided there, would not lie for the debt because the debtor resided in New York, but it was sustained for the instrument which did belong to the administrator in Vermont that being the place of domicile. We think, therefore, that this action cannot be maintained, upon the facts stated, in the courts of this state.

We are liable to some confusion of perception upon the subject of disposing of the effects of deceased persons, by attempting to keep up, in our minds, the same views and analogies which apply to the same species of property while all parties concerned are still living ; and also by apprehending money as capable of identification.

The truth undoubtedly is, that, as to choses in action, after the decease of one of the parties, they are incapable of any change, until the intervention of a personal representative of such deceased party, appointed by the proper municipal authorities of the place of the domicile of the debtor. Such choses in action can never be transferred, paid, or in any other manner affected, while one of the parties is legally extinct. Upon the appointment of the representative, the law throws the rights of the deceased party upon him just as they existed at the decease, except that any interference with the concerns of the deceased is regarded as a tort, and an action accrues from the perpetration of the wrong, by relation, which the representative may take up and prosecute.

Money, too, is incapable of identification. Hutchinson, by attempting to collect debts due Lester Abbott did not in fact obtain any money of the deceased. It was the money of the persons of whom

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he obtained it, and when paid to him it became his own. The debtors of the deceased did not by the transaction pay their debt. They, at most, acquired the obligation of Hutchinson to see it paid in a legal manner, in consideration of having received the amount of money. And the law, regarding this as a tort, will allow the representative of the deceased to waive the tort, and sue for the money by means of a legal fiction. So, too, all persons consenting to this tort, and receiving the avails of it, with the same undertaking to see it paid to the legal representative of the deceased, may possibly be liable for the money at the suit of the representative, by means of a legal fiction. But in all this, the law keeps up no idea of the identity of the money. Nor is it of the least importance whether it be the identical money or not. If that idea were to affect the case, the present plaintiff might himself be said to have received the money of the estate, and therefore be bound to administer it. But nothing of that is found. For he received the money of the widow, and clearly did not implicate himself in the original tort by which it was obtained, inasmuch as he was to pay it back to her. The money, all along, belongs to the several persons who pay and receive it. But by the transaction they may or may not be regarded as consenting to the original tort, and adopting it. But if they do, the consent to the original wrong is not itself a new and independent tort, to be answered for in the place where the transaction occurred.

According to the decisions in this state, I think the transmitting of this money to Massachusetts, and having it there administered that being the place of the domicile of the deceased, would afford no protection against the claim of an administrator appointed in California, who should sue either Hutchinson or the original debtors; or at least that is questionable upon our decisions. But Judge STORY lays down the rule, in his Conflict of Laws, that remitting the funds to the administrator in the place of domicile will be a discharge, and, upon principle and for convenience, I think it should be so. But he refers to no cases where it has been so held in England, and I doubt if any such principle has ever been there recognized. I think that is the rule of some of the American states, but no such rule could be applied to a merely auxilliary administration, which the plaintiff's clearly is. It seems to us,

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therefore, impossible to find any satisfactory ground upon which the plaintiff's right to this money can be vindicated. There may have been actions maintained in this state, where this same question might have been raised and was not. Courts do not ordinarily feel bound to go beyond the questions raised in argument, and when that is attempted, it is often at the hazard of making a wrong decision. And where the objection is merely technical, it would never be raised by the court, if not pointed out, or certainly, not ordinarily. Judgment reversed, and judgment for the defendant.

JOHN N. TRUE, ZIBA SPRAGUE AND ALDEN SPEAR v. *The Estate of JOHN W. MORRILL.*

Appeal. Homestead.

An appeal lies from the decision of the probate court setting out a homestead to the widow of a deceased person.

A piece of land which has a dwelling house upon it, occupied by a tenant, but upon which the owner never resided, cannot be treated as his homestead within the meaning of the statute, (Comp. Stat. ch. 65 § 1 & 4,) though he had no other dwelling house, and may have contemplated living upon the premises at a future time.

Nor can separate pieces of woodland from which the owner was accustomed to obtain wood for his own use, or a piece of land occupied only by a shop, or a pew in the meeting house, be regarded as a homestead, or a part of it, within the meaning of said statute.

APPEAL from a decree of the probate court setting out to the widow of the intestate a homestead. In the county court, January Term, 1856,—UNDERWOOD, J., presiding,—the appellee moved to dismiss the appeal, on the ground that the county court had no appellate jurisdiction of the subject matter. The motion was overruled, and the appellees excepted.

The parties then agreed upon a statement of the facts in the case, upon which the county court reversed the decree of the probate court setting out the homestead, to which the appellees also excepted.

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The facts agreed upon were substantially as follows. John W. Morrill deceased in September, 1854, leaving a widow but no children,—and leaving property, real and personal, to the amount of about five thousand dollars after the payment of all debts and charges of settling the estate, principally in notes and other personal property, there being but about five hundred dollars worth of real estate. The real estate which was set out to the widow, as the homestead of the deceased, consisted of four small detached pieces of land, and a pew in the meeting house.

One piece contained ten or twelve acres of land on which was a good barn and an old house, occupied by a tenant at the time of the decease of the intestate, and upon which the deceased never resided; but, previous to his decease, he had contemplated building a house there for his own occupancy, and had made some preparations therefor, by way of procuring and furnishing building materials,—and had attempted to negotiate for the building of the same. One other piece contained about twenty-two acres of wood and timber land, lying about fifty rods from the first mentioned piece, which the deceased had occupied by taking from it timber and firewood for his own use; another piece of wood land lay about one mile from the first mentioned lot, and contained about two acres; one other piece of two or three acres lay about one hundred rods from the first described lot, and on it there was a shop in which the deceased had stored some part of his household furniture, and in which he had some few tools, and had occasionally done some work. The pew was in the Union meeting house, and was occupied by the deceased and his family.

The intestate, at the time of his decease, was not keeping house, but was hiring his board in the family of one John Richardson, within some fifty rods of the first mentioned piece of land, and had so boarded for about six months previous to his death. He had, for a long time, owned and occupied a farm in the vicinity of these pieces of land, but a little more than two years previous to his decease he sold his farm, but continued to occupy a part of the house upon it up to the time when he went to board with Richardson.

Peck & Colby for the appellees.

This case is not appealable, nor is it an adversary proceeding.

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The statute casts the title by descent on the widow and children; and the probate court can neither give or deny such title. They may, "if *necessary*, appoint three commissioners to set out to such widow such homestead." Comp. Stat. chap. 65, § 4.

The object of this statute is to effect a *severance* merely. The homestead exists independent of the probate court, and a decree setting out lands not properly homestead will have no effect upon the owners of the lands. No provision is made for an appeal by law, and none for proceedings on an appeal in the county court. If an appeal can be had by the heirs, it can be had by the widow. Suppose the probate court refuse to appoint commissioners to set out a homestead, not thinking it "*necessary*." Would an appeal lie? Suppose said court refuse to to decree a homestead, could she appeal? and what proceeding would be had in county court?

W. Hebard for the appellants.

The opinion of the court was delivered by

BENNETT, J. It has been settled by this court, in a case in Rutland county, that causes of this description come within the general provisions of the probate law allowing appeals from the decisions of the court of probate.

The more important inquiry in the case is in regard to the character of the property set out to the widow. Was it of the character, and so occupied by the husband at the time of his decease, as to bring the case within the provisions of the first section of the homestead act? This section defines a homestead as consisting "of a dwelling house, out-buildings, and lands appurtenant, occupied as a homestead by a housekeeper or the head of a family," and the fourth section provides that upon the death of such housekeeper or head of a family, leaving a widow, his homestead shall pass to his widow and children, if any there be, in due course of descent. The object of the law creating a homestead which should not be subject to the debts of the husband, is of a humane character, and should be held to apply fairly to all such cases as are within the equity and spirit of the act, but, beyond this, we should not go. It seems the deceased was a man in good circumstances, leaving an estate of some five thousand dollars above all his debts, being mostly in

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notes and personal property. The farm which the deceased had for a long time owned and occupied, in the vicinity of the pieces of land set out to the widow, had been sold more than two years before his death, and, at the time of his death, he was not keeping house, but had been boarding, for some six months, in the family of a Mr. Richardson, some little distance from any of the land set out to the widow. Although the case finds that after the sale of the farm the deceased continued to live in a part of the house up to the time he and his family went to board with Richardson, yet his occupancy must have been in the character of a tenant during that time. This farm, no doubt, at the time of its sale, was *occupied by the deceased as a homestead*, but we think this cannot be said of any of the pieces of land set out to the widow. The first piece, consisting of some ten or twelve acres, had been occupied by a tenant, and upon which the deceased had never resided. Where the statute speaks of a housekeeper, or the head of a family, occupying a place *as a homestead*, it no doubt refers to a personal occupation, and not by a tenant. The woodland, though it may have been occupied by the deceased, previous to his death, for the purpose of taking timber and fire-wood from it for his own use, yet it would be an abuse of language to call it his *homestead*. So it may be said of the small piece upon which there was a shop, in which the deceased had stored some of his furniture, and in which he had some tools, and occasionally did some work. There is no pretence that he or his family occupied it in any other way. It was no *homestead*, not any more so than the pew in the meeting house occupied by the deceased and his family when they went to church.

We think, then, the judgment of the county court, reversing the decree of the court of probate should be affirmed with costs.

 Admr. of Merrill v. True.

Amount brought forward,	\$85 00
" 1847 To trouble, time and care in collecting and loaning " money belonging to said estate, and paying out the same	15 00
" 1848 " " " "	15 00
" 1849 " " " "	14 00
" 1850 " " " "	10 00
" 1851 " " " "	15 00
" 1852 " " " "	15 00
" 1853 " " " "	15 00
" 1854 " " " "	15 00
	<hr/>
	" \$149 00

He had taken charge of said estate from the settlement October 12th 1843 to October 21st, 1854, loaned said money, collected and paid the interest annually to Abigail Merrill, the widow of said Stephen Merrill. He did not keep an account of the time spent, but made the charge at the end of each year, of all but the last four or five items, which he made at the time of the settlement before the probate court, in October, 1854. He paid the taxes as administrator, and Mrs. Merrill paid the amount of said taxes to him annually; and paid him the sum of two dollars, annually, for the trouble of carrying her interest to her, and paying the taxes. Said Richardson, some time between the settlement October 12th, 1843 and the settlement October 21st, 1854, sold a sleigh and harness for fourteen dollars, for which sum he held a note; the interest on said note he had annually paid Mrs. Merrill, but the same was omitted, by mistake, in the settlement made October 21st, 1854. There was no controversy about this item before the probate court, or any other, except for the administrator's services, in taking care of said estate. The sum charged and allowed by the probate court was reasonable for the time spent and trouble and care of the said Richardson, who spent time enough to amount to that sum, if it had been charged for by the day.

The appellant contended that all said Richardson's account for services should be disallowed against the estate, and that the same should be paid by Abigail Merrill, widow of said Stephen Merrill, she having had the use of said estate during all the time for which said charges were made.

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The county court, January Term, 1856,—UNDERWOOD J., presiding,—rendered judgment, on the report of the commissioner, for the appellant, disallowing the administrator's charges for his services, on the ground that, in justice and equity, as well as at law, the expense of managing the property, the use of which was given to the widow during her life, should, during that time, be a charge on that use, instead of a charge upon the estate, and be borne by the widow instead of the estate. To this decision the administrator excepted.

Peck & Colby for the administrator.

To throw this charge upon the widow's interest would be inequitable.

The settled rule in equity is to charge a trust fund with the expense of its management, and for which the trustee has a lien on the fund. *Hill on Trustees* 570. *Warrall v. Harford* 8 Vesey 8.

W. Hebard for the appellant.

Whatever expense is incurred, in taking care of the property, should be paid by the party for whose benefit it is done.

1. The will made the widow the executrix, and she could no more enlarge the use or benefit to be derived from her legacy, than she could enlarge the legacy itself.

2. If she had accepted the trust of executrix, as the testator designed that she should, and which was a qualification of the bequest, she could not have charged for taking care of the personal property, any more than she could for taking care of the real estate.

3. The term *use* implies that the fund is to be kept good and not be encroached upon. If the doctrine contended for prevails, the result might be that the whole principal would be absorbed.

4. If the widow is entitled to the interest of the money, without being at any trouble or expense of looking after it, upon the same principle she might claim the whole produce of land, without being at the expense of collecting it. This is not claimed.

5. The widow paid for collecting and bringing the interest to her.

That is all, in point of fact, that there was to do, but the administrator has charged and been allowed for something more.

Admr. of Merrill v. True.

Why should she not pay for keeping and exchanging the notes, as well as pay for collecting the interest? There is no doubt that she should do both.

The opinion of the court was delivered by

BENNETT, J. The only material question in the case is in relation to the allowance of the account of the administrator. The testator, Stephen Merrill, died leaving a will by which, after giving to his widow all his household furniture absolutely, and a legacy of five hundred dollars to his daughter Louisa, he gave to his widow the use and improvement of all the rest of his real and personal estate during her natural life and all that should remain at her decease he gave to his children and grandchildren. The widow was appointed executrix under the will, but she having refused to act as such, administration was committed to John Richardson, with the will annexed. It appears that in the month of October, 1843, Richardson rendered to the court of probate his administration account, which was allowed to him, and there then was found a balance in his hands of some twenty-four or five hundred dollars in money and notes, some personal property which had not been sold, and a small amount of real estate. This property remained in the hands of John Richardson quite a number of years, and it is for taking charge of this property subsequent to the rendition of his account in 1843, that the charges are made. We see no sufficient reason why the administrator should not have his account allowed him, against the estate. The administrator, with the will annexed, had the property in his hands in trust, and in the character of administrator; and as such was liable, at all times, to be called to an account for it before the probate court. It is a very common chancery principle that the expense of taking care of a trust fund is to be paid out of the fund, and it is often said the trustee has a lien upon it for the payment of his account. So with executors and administrators; they are entitled to have all accounts, allowed them as such, paid out of the funds in their hands; and we see no reason why this case should be made an exception. If those in interest saw fit to permit the property to remain in the care and custody of the administrator, and thereby have the security of his administration bond for a final accounting

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for the property, he certainly should be allowed for his administration account in managing the property. If, from the payment of this account out of the common fund, equities arise between those entitled to the fund, they must be adjusted between themselves. The commissioner finds that the sum allowed the administrator by the probate court was reasonable for the time, care and trouble expended by him, and that time enough was expended to have the account amount to the sum allowed by the court of probate, at the rate of compensation fixed by the statute for executors and administrators per day. It has been frequently decided, in this state, that a charge in gross by an administrator does not, as matter of law, furnish a reason why the charge should not be allowed, although gross charges may be the subject of severe scrutiny.

The administrator should clearly account for the fourteen dollars which he received upon the sale of the sleigh and harness belonging to the estate, and, by mistake, not accounted for in his previous account.

The judgment of the county court is, then, reversed with costs, and judgment rendered in this court in conformity to the judgment of the court of probate.

ZACCHEUS FLINT v. WILLIAM WHITNEY.

Tax collector's warrant. Tender of property to prevent taking body of delinquent. Copy and return to be left with jailor.

A warrant for the collection of highway taxes is insufficient, if, in the event of the neglect of any of the persons assessed to pay their taxes, the only command to the collector be "to proceed with him or them as the law directs."

To make the collector of a tax liable in trespass merely for taking the body instead of the property of a delinquent tax-payer, there must be a distinct offer to him of some specific property. A general request to take property and proof that the person assessed had property will not suffice.

The omission of a tax collector, who commits a delinquent to jail on account of the non-payment of his tax, to certify his doings on the copy of his warrant left with

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the jailor cannot be supplied by parol proof of his proceedings. The original warrant not being a returnable process, a certificate of the collector thereon is not so far in the nature of a return as to be conclusive upon the parties.

TRESPASS for false imprisonment. Plea, the general issue, and notice of a justification under a warrant for the collection of a highway tax against the plaintiff. Trial by the court, January Term, 1856,—UNDERWOOD, J., presiding.

The defendant was one of the highway surveyors in the town of Brookfield for the year 1852; and on the 24th of May of that year the selectmen of that town placed in his hands a tax-bill and warrant, of which the following is a copy.

"STATE OF VERMONT, *Orange County, ss.* To William Whitney, one of the surveyors of highways in Brookfield, in said county,

Greeting,

"By the authority of the state of Vermont, you are hereby commanded to collect of the several persons named in the within tax-bill, inhabitants who are liable to pay highway taxes in said Brookfield, the sums annexed to their names, in money or labor, and cause the same to be laid out in making and repairing the roads and bridges within the limits hereinafter described, viz., the same as last year."

(Here follow the names of the persons assessed, with the amount of their respective grand lists and taxes, among which is that of the plaintiff.)

"Three-fourths of the tax to be collected and laid out as aforesaid, between the first day of May and the first day of July next; and the remainder between the first day of September and the first day of November next. For labor, you are to allow, for a good hand, ten cents per hour; for a yoke of oxen, per day, \$1.00; for a pair of good horses, per day, \$1.25; for a cart, plough and scraper, in proportion, and, if damaged, to be made good. And, if any person or persons shall neglect to pay said sum or sums in labor as aforesaid, you are to proceed with him or them as the law directs. Hereof fail not," &c., &c.

The defendant called upon the plaintiff several times for the payment of his said tax, and, at the time in question, met him away from his home and inquired of him what he was going to do about the tax. The plaintiff said he did not know, but as the defendant should say, he supposed. The defendant then read his warrant to

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the plaintiff, and told him he had a right to take his body or property. The plaintiff asked him if he would not take the property. The defendant said no, and that he wanted his body then, and thereupon the plaintiff surrendered himself, and the defendant committed him to jail in Chelsea. It appeared that the plaintiff then had a horse, sleigh and buffalo robes with him, and three or four hundred dollars in money in his pocket, but he did not turn out or designate any property for the defendant to take to satisfy the tax, and he refused to pay it.

Upon the trial, the defendant, to justify the arrest and commitment of the plaintiff, offered in evidence his rate-bill and warrant, together with his return annexed thereto in which the defendant's proceedings in collecting said tax of the plaintiff were set forth, and in which he stated that, upon the commitment of the plaintiff, he left with the jailor a true and attested copy of the rate-bill and warrant, with his doings thereon endorsed. This evidence, though objected to by the plaintiff, was admitted by the court, subject to all legal objections. The plaintiff offered in evidence a copy of said rate-bill and warrant without any return whatever accompanying it, and proposed to inquire of the defendant, who was a witness in the case, if this was not the copy, and the only copy, he left with the jailor at the time he committed the plaintiff to jail, and whether the return introduced by the defendant was not made at a subsequent time. To this evidence the defendant objected, insisting that the return on the original warrant was conclusive, and not subject to be inquired into. The court overruled the objection and admitted the testimony, from which it appeared that the only copy left with the jailor, at the commitment, was the paper offered by the plaintiff, and that the return on the original warrant was not made by him until a month or more afterwards. Upon this state of facts, the court rendered judgment for the plaintiff.

Exceptions by the defendant.

Perrin and Peck & Colby for the defendant.

When the plaintiff refused to pay his tax, the defendant had the right to arrest him, unless he requested him to take property. This he did not do. It does not even appear that the defendant knew that the plaintiff had property.

The rate-bill and warrant are in the usual form.

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The return on the warrant is conclusive between these parties in this action. Had the defendant been sued for a false return, it would then have been competent for the plaintiff to show the *falsity* of the return. But the question now arises collaterally, and, in such case, parol evidence is not admissible to contradict the return. *Hawks v. Baldwin*, Brayt. 85; *Carney v. Dennison*, 15 Vt. 400.

J. B. Hutchinson, S. M. Flint and J. P. Kidder for the plaintiff.

The warrant is not sufficient. The defendant is not therein commanded to take either the goods or chattels or the body of the delinquent. It is not in the form prescribed; Comp. Stat. p. 616, form 23. It is bad for want of substance.

The same powers are given to highway surveyors that are to constables; Comp. Stat. p. 178, § 21. "For want of goods and chattels whereon to make distress, the constable may take the body of such delinquent." Comp. Stat. p. 464, § 14.

The case shows that the plaintiff, at the time of the arrest, "had a horse, sleigh and buffalo robes with him," and the defendant *refused* to take property, but "wanted his body then."

He should have left with the keeper of the jail an attested copy of his warrant, and have certified his doings thereon; Comp. Stat. p. 464, § 15; *Henry v. Tilson*, 19 Vt. 447.

A regular tax-bill and warrant, of themselves, are not a sufficient justification; *Collamer v. Drury*, 16 Vt. 574; *Downing v. Roberts*, 21 Vt. 441. The original warrant is not a returnable precept; nor is the return thereon evidence, the officer not being required by law to certify his doings, except upon the jail copies; *Hathaway v. Goodrich*, 5 Vt. 65; *Spear v. Tilson*, 24 Vt. 420.

The opinion of the court was delivered by

REDFIELD, CH. J. I. It seems to us the form of the warrant, in this case, is so essential a departure from the form given in the statute, that it should be regarded as altogether insufficient. It, in truth, omits everything, almost, which is requisite to constitute a valid warrant. It is a mere direction to the officer that if the persons assessed do not pay their tax, "to proceed with him or them as the law directs." If the officer did not follow the statute more

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clearly than the form of the warrant does, we could scarcely conjecture what he might not feel justified in doing, under such general words. It reminds one of the form of the aboriginal warrant to arrest one for crimes. "I, Hihondi. Quick you take A. B. Fast you hold him. Straight you bring him before Hihondi"! This is even more specific than the warrant in the present case. Still it has been contrasted with the forms of such process, in modern states, as a significant antithesis.

II. We are not satisfied that there was any such refusal to take property, as should make the defendant a trespasser. There was nothing like an offer of property, but, from what passed at the time of the arrest, it is evident the defendant's understanding was that, if he took property, he must wait and go to some distance. For he said, "he wanted his body then." If the plaintiff had been serious in desiring the defendant to accept of property in discharge of the body, he should have made some distinct offer of some specific property, especially as he had abundance with him at the time. The statute is express, that the collector may execute his warrant "wherever he may find the property or body of the delinquent." He was not obliged to delay.

III. Chapter 81, § 15, requires the officer, in committing a delinquent for taxes, to leave a copy of his warrant, and "certify his doings thereon in relation to such delinquent." This was not done in the present case. In *Henry v. Tilson*, 19 Vt. 447, this is held indispensable, and that the omission cannot be supplied by proof at the trial that the officer had, in fact, proceeded regularly. And, in a case between the same parties, 17 Vt. 479, it was held that such a warrant, even where there is commitment, is not returnable process, so that the surveyor's certificate, entered upon the warrant at a future day, cannot be treated as in the nature of a return upon process, and so conclusive upon the parties.

Judgment affirmed.

Pratt v. Battels.

EUNICE PRATT v. JASON BATTELS.

Trespass. Damages. Deed of husband and wife. Statute of limitations.

The plaintiff claimed title to a piece of land upon which a quantity of wood had been cut by a person claiming adversely to her, by whose employment the defendant removed the wood about one hundred rods from the place where it was cut, but left it on the same lot. *Held*, that if the wood belonged to the plaintiff, so that she could maintain an action of trespass against the defendant for the removal, she could recover only nominal damage, or such actual damages as were occasioned by the removal.

In a deed from a husband and wife, executed while our statute required the acknowledgment by the wife to be made by her separately from her husband, it should appear in the certificate of acknowledgment that it was so acknowledged by her. If it does not, the deed will be inoperative and void as against the wife.

The possession of land taken under a deed from a husband and wife, without a certificate of such an acknowledgment by the wife, will not be adverse to her rights while she remains under coverture. The statute of limitations will commence running against her only from the death of her husband.

TRESPASS for taking a quantity of wood. Plea, the general issue; trial by jury, January Term, 1856,—UNDERWOOD, J., presiding.

The plaintiff claimed title to the land on which the wood was cut, under a deed from her father to her before her marriage with Charles Pratt, in 1804, the said Charles having died in 1848. It appeared that in 1807 the said Charles and the plaintiff executed a deed of the premises to a person under whom, as well as under a vendue title, other persons now claimed to hold the premises, but the deed had no certificate of its having been acknowledged by the plaintiff separate and apart from her husband, the certificate being as hereinafter set forth in the brief of the defendant. The defendant offered to prove, by parol, that the deed was, in point of fact acknowledged by the plaintiff apart from her husband; but the plaintiff objected to the testimony, and it was excluded by the court. It also appeared that one of the persons now claiming the premises adversely to the plaintiff sold the wood in question to one Samuel Mann, who caused it to be cut, and, after it was cut, employed the defendant to draw it about one hundred rods from where it then lay, to the side of a railroad, passing through said lot; and the defendant did so draw it, and left it by the side of the railroad,

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but upon the same lot upon which it was cut,—and then had no more to do with it,—but the said Mann afterwards sold it to one Hawes, who burned it into coal. The defendant requested the court to charge the jury, among other things, that if the plaintiff was entitled to recover at all, she could recover only nominal damages; but the court charged that the plaintiff was entitled to recover the value of the wood drawn by the defendant, at its worth on the stump. Exceptions by the defendant.

Other questions than those above suggested were made in reference to the plaintiff's title to the premises, and her right to maintain the present form of action, &c.; but as they were not passed upon by the supreme court, the facts and testimony in reference to them are omitted.

J. B. Hutchinson and *J. P. Kidder* for the defendant.

The deed from the plaintiff and her husband is good and valid to convey her title. It is acknowledged in accordance with the provisions of the statute, "that no real estate, of which any *feme covert* is or shall be seized, shall pass by deed of herself and "baron, without a previous acknowledgment made by her separately from her husband, before a judge of the supreme court, or "or a judge of the county court, or a justice of the peace of the "county in which such married woman shall live, or the land so "to be conveyed does lie, that she executed such deed freely and "without any fear or compulsion of her husband; a certificate of "which acknowledgment, taken as aforesaid, shall be endorsed on "the deed, by the judge taking the same, and recorded at large "with the deed. And every alienation of such estates, not acknowledged and recorded as aforesaid, is hereby declared to be "utterly void." 1 vol. of statutes, compiled in 1808, p. 195, § 12. The acknowledgments are as follows:

"STATE OF VERMONT, *Orange County*, ss. *Chelsea*, March 24, "1807, personally appeared Charles Pratt, signer and sealer of the "foregoing instrument, and acknowledged the same to be his free "act and deed. Before JOSIAH DANA, *justice peace*."

"STATE OF VERMONT, *Orange County*, ss. *Chelsea*, March 24, "1807, personally appeared Eunice Pratt, signer and sealer of the

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"foregoing instrument, and acknowledged the same to be her voluntary act and deed; and that she executed said deed freely and without any fear or compulsion of her husband.

"Before me, JOSIAH DANA, *justice peace.*"

The statute is strictly complied with. Her being "separately from her husband," is no part of the acknowledgment; it is a mere fact, which appears from the deed itself. Her acknowledgment is separate from that of her husband. The statute does not read "apart from her husband," as does the present statute. *Separately* means *singly*. In this case there is a single acknowledgment by each of the grantors. *Apart* means in a state of separation as to place. The acknowledgment is, "that she executed said deed freely, and without any fear or compulsion of her husband," which must be certified to by the judge taking the same.

E. Weston and L. B. Peck for the plaintiff.

The plaintiff contends that the deed of Pratt and wife, of March, 1807, is *void* as to her, for the want of a sufficient certificate of acknowledgment thereon to comply with the statute of March 6, 1797, then in force. See Slade's compilation of laws of 1825, and former compilations; 1 Tyler's Reports 6, *Harman v. Taft et al.*; do. 42, *Sumner v. Wentworth*; 15 Vt. 344, *Giddings & Wife et al. v. Smith et al.*; 1 Peter's 328, *Elliott et al. v. Peirsol et al.*

The opinion of the court was delivered by

ISHAM, J. Several questions have been raised during the argument of this case, some of which, it is unnecessary, at present, to decide. If the plaintiff's title to this land is sufficient to enable her to recover its possession in the action of ejectment, yet, as those under whom the defendant acted were, and for a long time had been in the actual adverse possession of the premises, she cannot sustain an action of trespass on the freehold for cutting the trees from which the wood in question was derived. Whether her title to the land would vest in her a general property in the wood, after it had been severed from the freehold, and draw with it that constructive possession which will enable her to sustain this action, is a question not necessary now to decide. There are obviously

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serious difficulties in sustaining such an action; for, if the title to real estate will give a general property and a constructive possession to whatever is severed from the land while it is in the adverse possession of another, then in an action of trover or trespass *de bonis* against the *actual possessor*, the only question may arise in whom the title to the land really exists. If this action can be sustained, it will enable the plaintiff to try her title to the realty, without ever having made an entry upon the land, or adopting any means whatever to reduce her title to possession. 1 Smith's Lead. Cases 410; *Mather v. Trinity Church*, 3 S. & R. 509. But whatever may be the rule on that subject, we are satisfied that the defendant is not liable in this case for the value of the wood, as it stood upon the land. It is not pretended that the defendant has used the wood, or in any way converted it to his own use, or done any act in relation to it but simply remove it from one place to another on the same premises. It was never removed from the farm on which it was cut, and, in fact, the wood was left by the defendant in the actual and constructive possession of the same person in whom it was before the removal was made. The plaintiff had the same constructive possession after the removal by the defendant, that she had before; for it was left on the same premises to which she made her claim of title. The defendant, for that act, cannot be made liable for the value of the wood as it stood on the stump. The plaintiff can recover but nominal damages, or, at most, the actual damages sustained from the *mere act of removal*. If the defendant had removed the wood from the premises, and had taken the same into his exclusive possession, and an action of trespass or trover had been commenced against him, yet, if before judgment the property had been returned and placed upon the premises from which he had taken it, the rule of damages would be the same; the plaintiff could recover but nominal damages, or, at most, actual damages for the removal. The return of the property would mitigate the damages to that amount. The rule of damages in this case can be no greater than in that, for the injury sustained is no greater. The fact that this wood was left in the same lot in which it was taken, and, consequently, as much in the possession of the plaintiff as it was before its removal, should have

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the effect to reduce the plaintiff's claim to nominal damages, or such actual damages as was sustained from the act of removing it. For that matter, we think, the judgment must be reversed.

In relation to the deed of Charles Pratt and his wife, the present plaintiff, we have no doubt that it is inoperative and void as to her, and that she is now clothed with the same rights she would have had if the deed had not been executed. The statute under which that deed was executed required an acknowledgment by the wife, separate from her husband, that she executed the deed freely, and without any fear or compulsion from her husband;—not that separate certificates of that acknowledgment are necessary, but that those facts were acknowledged by her, separate from her husband, and away from his actual presence. That fact must be stated in the certificate of the magistrate, and recorded with the deed, otherwise the statute itself declares the deed null and void. The acknowledgment of the deed in this case has no certificate that it was made separate and away from the actual presence of the husband, and, for that reason, by the express provision of the statute, the deed must be treated as inoperative and void, as to her. The case of *Elliott v. Piersol et al.*, 1 Peters 328, is in point on that question. Slade's Comp. of Stat. 171, § 12.

The plaintiff, however, could make no claim to the land during her coverture, for the deed was good as conveying the life estate of her husband. After the death of her husband, on the 17th of August, 1848, her right to the land revived, and, as against her, no title by adverse possession has been acquired; for, during her coverture, she was excepted from the operation of the statute.

The judgment of the county court must be reversed, and the case remanded.

Brown v. Clark.

WILLIAM J. BROWN v. CHESTER CLARK.

Recognizance for review.

In an action on a recognizance for a review, if there was a breach of it, and the debt is paid after the commencement of the suit, but without the costs of it, the plaintiff will be entitled to a judgment for nominal damages and costs.

The condition of a recognizance for a review is not broken if no intervening damages are sustained, and no additional costs recovered by the reviewee.

Where, in an action on a recognizance for a review, it only appears that, subsequent to the review, the reviewee obtained a judgment for a given sum in damages, and a given sum for costs, the supreme court cannot take judicial notice that any of the costs so recovered were for costs which accrued after the review.

DEBT on recognizances, in reference to which the parties agreed upon the following statement of facts.

"This was an action of debt on two recognizances for reviews in two actions, heretofore pending in Orange county court, in favor of the present plaintiff, against Daniel Tarbell, Jr., and others. Subsequently to said reviews, judgments were rendered, in both said actions, against the defendants therein at the term, and for the amounts as stated in the plaintiff's amended declaration.

"Phinehas Pierce of Royaltown, in the county of Windsor, was the owner of the demands for which a recovery was had in the above named suits, and was the plaintiff in interest therein, the said Brown being merely a nominal party for the convenience of bringing the suits in this county. Executions were duly issued upon the judgments rendered in the above suits, and placed in the hands of one Minot Wheeler, a deputy sheriff in and for the county of Windsor, for collection. The writ in the present suit, was served upon the defendant Clark on the 13th of May, 1854; and on the 14th of June, 1854, the aforesaid executions were fully paid and satisfied, and the said Wheeler, still having the executions in his hands, received from said Pierce a writing, of which the following is a copy.

'MINOT WHEELER, Esq.,—*Dear Sir:* You will have the goodness to discharge the two executions in your hands, *Wm. P. Brown v. Daniel Tarbell, Jr. et als.*, as I have received satisfaction for the same.' (Signed,) 'PHINEHAS PIERCE.'

South Royaltown, June 14, 1854.

"At the date of the above writing to Wheeler, Daniel Tarbell, Jr.,

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executed and delivered to said Pierce, a writing of which the following is a copy.

‘I hereby agree to pay all further legal costs on the two executions now in M. Wheeler’s hands, *Wm. P. Brown v. Daniel Tarbell Jr. et als.*, if any there be, not included in said executions. (Signed,) D. TARBELL JR.’

“No costs in the present suit were embraced in the settlement of the said executions, or in any way paid. The executions mentioned in the foregoing papers are the same, which were issued upon the judgments mentioned in the plaintiff’s amended declaration.

“Pierce’s interest in, or relation to the various suits above mentioned, or rights of action growing out of the same, have not been changed in any way since the commencement of the original suits by Brown against Tarbell and others, on which the said reviews were taken, except by the settlement of the executions as before stated; and said Brown is merely a nominal plaintiff in the present suit.

“If the plaintiff is entitled to recover on the foregoing statement of facts, damages are agreed on at one cent.”

The averments in the amended declaration, which are referred to in the foregoing statement, are sufficiently stated in the opinion of the court.

On this statement of facts, and the papers referred to, the county court, January Term, 1856,—UNDERWOOD, J., presiding,—rendered judgment for the defendant, to which the plaintiff excepted.

C. M. Lamb for the plaintiff.

The plaintiff’s right of action became absolute when the defendants failed to prosecute their reviews to effect, and the previous judgments had been affirmed; the defendant’s recognizance then became forfeit; *Way v. Swift*, 12 Vt. 390; *Stevens v. Briggs*, 14 Vt. 44.

The payment to Pierce, having been made subsequent to the commencement of this suit, constituted no defense to it, without the payment of the costs also; and, for intervening damages and costs in the original suits, accruing between the review and final judgments, the defendant was liable, as for damages, in this suit. These damages are the necessary result deduced from the facts agreed

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upon. The case shows that no costs in the present suit have ever been paid; Chitty on Bills, 10 Am. Ed. 539 and 585; 12 Vt. 390, *Way v. Swift*; 14 Vt. 44, *Stevens v. Briggs*; 22 Vt. 288, *Belknap v. Godfrey*.

The present case is one where a party is pursuing separate and different remedies to obtain satisfaction for the same demand, which he has a right to do. The deputy sheriff having neglected to collect or return the executions within life, and retaining them in his hands unsatisfied, the creditor was justified in proceeding in this collateral way for a partial satisfaction; 14 Vt. 44, *supra*; Chitty on Bills, 10 Am. Ed. 539, 585; *Smith v. Ingraham*, 22 Vt. 414; *Brown v. Richmond*, decided in this court in this county, March Term, 1855.

C. W. Clarke for the defendant.

There has been no breach of any condition of these recognizances. The conditions are to pay all "intervening damages, and additional costs;" and it is necessary to show that "intervening damages, or additional costs," one or both have accrued; *Way v. Swift*, 12 Vt. 390; *Green v. Shurtliff*, 19 Vt. 592. *This case*, Orange county, March Term, 1855.

The only fact shown by this statement, is that at the time this suit was commenced, the judgments in the original suits, in which the reviews were taken, remained unsatisfied. This is an immaterial fact; *Way v. Swift*, 12 Vt. 390.

The defendant undertook; by his contracts of recognizance, to keep the defendants in the actions, reviewed as good as they were when the reviews were taken, until the plaintiffs should procure executions; to make up to them all losses which should happen to them after the reviews, and pay the additional costs; *Green v. Shurtliff*, 19 Vt. 592.

No damages to the plaintiff, by reason of any failure of the defendants after the reviews, or impairing of securities, are attempted to be shown, nor does the case show the recovery of any additional costs.

The opinion of the court was delivered by

BENNETT, J. We think the judgment of the county court

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should be affirmed. If the case showed a breach of the condition of either recognizance, the judgment should have been, at all events, for the plaintiff for nominal damages and costs. The payments of the executions by Tarbell, after this suit was commenced, could not bar the action without a payment of the costs.

But we are to take the facts as agreed by the parties ; and those are, "that subsequently to said reviews, judgments were rendered in both of said actions, against the defendants therein, at the term, and for the amounts as stated in the plaintiff's amended declaration."

The statement in the amended count in the declaration is that judgments were rendered for a given sum in damages, and for a given sum for costs. There is no averment that any part of the judgments for costs were for costs that accrued after the reviews were entered ; and we cannot take judicial notice that any additional costs were allowed to be taxed by the court, subsequent to the reviews. Though the declaration avers that the plaintiff sustained intervening damages, yet there was no such fact in the case, and no proof of the averment that the plaintiff had been put to great additional expense in prosecuting his suits to final judgment.

When this case was before us at a previous period, it was held that the mere affirmance of a judgment reviewed was not a breach of the condition of the recognizance for a review, unless intervening damages had been sustained, or additional costs had been recovered. See S. C. 27 Vt. 576. It may have been an omission in the agreement of facts, in its not showing that additional costs had been recovered.

The judgment of the county court is affirmed.

Cabot v. Burnham's trustee and claimant.

HYDE CABOT v. ROSWELL S. BURNHAM; DYER WALTON
trustee; DANIEL BURNHAM, claimant.

Right of claimant, in trustee suit before justice, to appeal.

A claimant of the effects in the hands of a person summoned as trustee in a suit before a justice can only appeal, if at all, in such cases as are appealable by the other parties. If, therefore, the action be upon a note for less than \$20, and the indebtedness of the trustee be upon a similar note, the claimant cannot appeal from a decision and judgment adverse to his claim.

APPEAL from a justice's judgment in an action upon a note for \$18. Before the justice, the trustee disclosed that he was indebted to the principal defendant upon a note for less than \$20. The claimant appeared before the justice, and claimed the note against the trustee, as belonging to him, but the justice rendered judgment in favor of the plaintiff against the trustee, for the amount due on the note, which was less than the judgment recovered against the principal defendant. The claimant appealed. In the county court, January Term, 1856,—UNDERWOOD, J., presiding,—the appeal, on motion of the plaintiff, was dismissed, to which the claimant excepted.

O. W. Clarke for the claimant.

W. Hebard for the plaintiff.

BY THE COURT, REDFIELD CH. J. This is an appeal from a justice's judgment, by the claimant, in an action upon a note less than \$20. If the claimant is allowed to appeal, in such cases, because he is a party, he can only appeal, we think, in such cases as are appealable by the other parties, if they desire to appeal.

The judgment only affects him to the same extent it does other parties, *i. e.* its amount, which seems the ground of denying appeals in actions on notes of \$20 or less. And the fact that he is interested in a collateral issue will make no difference in regard to the right of appeal; if so, all cases might be appealed by the claimant, when otherwise final, even where the controversy was in regard to a note less than \$20, which would not be appealable when the action was directly upon the note.

Judgment affirmed.

Blodgett v. Brattleboro.

B. T. BLODGETT v. THE TOWN OF BRATTLEBORO.

Process. Appearance. Waiver.

The plaintiff's writ was dated April 22, 1855, and made returnable to the county court next to be held at, &c., "on the 4th Tuesday of June next," but was not served until the 19th of December, 1855, or entered on the docket of the county court until its January Term, 1856. *Held*, that the proceedings were irregular on their face, and should, on motion, be dismissed; and that an appearance of the defendant, for the purpose of having the process dismissed on account of such irregularity, was not a waiver of it.

ACTION ON THE CASE for the negligence of a constable of the defendant town. The cause was entered upon the docket of the county court at its January Term, 1856, at which term the defendants appeared and filed a motion to dismiss, as follows:

"And now come said defendants and move the honorable court that said action be dismissed, for the reasons that the writ in this case was sued out on the 22d day of April, 1855, and made returnable to the term of this court then next to be holden, at Chelsea, within and for said county of Orange, on the 4th Tuesday of June, 1855,* which writ was not served on said defendants till the 18th day of December, 1855, and was entered on the docket of this court at the present term thereof, and not before; all which, appears by said writ, and the docket of this court, by which the defendants will verify and prove the facts aforesaid."

On hearing the above motion, the county court,—UNDERWOOD, J., presiding,—having found the facts stated therein to be true, dismissed the action, to which the plaintiff excepted.

R. McK Ormsby for the plaintiff.

The command in the writ is to appear at the court next to be holden, at Chelsea, within and for Orange county, "on the fourth Tuesday of June next." That the writ bore the date of April 22d, is of no importance, as without date it would have been good. "The next term," must be taken in reference to the service; as taken in reference to the date would be an impossible command. The words "*fourth Tuesday of June next*," may be rejected as surplusage; *Dean v. Swift*, 11 Vt. 331.

*The return day, as stated in the writ, was "the fourth Tuesday of June next," as recited in the plaintiff's brief; the year only appearing by reference to the date.

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General appearance is a submission to the jurisdiction of the court, and covers all defects of writ and service, saving such as are objected to in seasonable time. The motion here was not filed within the rule as to dilatory pleas.* 17 Vt. 531; 22 Vt. 325.

In cases even where the statute directs actions in being brought without certificate of time of signing, to be, on motion, dismissed, it has been held that these motions should be made within the rule for dilatory pleas. 17 Vt. 48; 19 Vt. 559.

Peck & Colby for the defendants.

The opinion of the court was delivered by

BENNETT, J. This case was properly dismissed. The writ was dated in April, 1855, and made returnable to the June Term of the county court next thereafter, but not served until December, 1855; and was, in point of fact, returned to the January Term of the county court, 1856, and then entered upon the docket of said court.

The proceedings are *irregular* upon the face of them, and there can be no *intendment* by which the *irregularity* can be cured. The process is no notice to the defendants to appear at the January Term of the county court, 1856; and the appearance of the defendants, for the purpose of having the process dismissed on account of such irregularity, cannot constitute a waiver of it.

Judgment affirmed.

*The day upon which the motion to dismiss was filed does not appear from any papers furnished to the reporter.

Lampson v. Hobart's Estate.

M. J. LAMPSON, *Apt. v.* The estate of ADAM HOBART.

Statute of frauds. Principal and surety. Estoppel.

The plaintiff having a demand against H. & D. which he was about to secure by an attachment of their property, the intestate, who had a larger claim against H. & D. than that of the plaintiff, promised that, if the plaintiff would forbear to commence a suit and make cost by attaching the property, he would pay the plaintiff's debt. The plaintiff did forbear, and assisted the intestate in securing his debt by an attachment, with other property, of that which the plaintiff was about to attach. *Held* that the promise was not within the statute of frauds, it being an absolute promise, in which the original debtor had no interest, and the consideration being entirely between the plaintiff and the intestate.

A surety is not entitled to an allowance of a claim against the estate of his principal for money paid by him for and as the surety of the deceased, if, with his consent, there has already been an allowance of the same claim against the estate in favor of his co-surety.

APPEAL from the decision of the commissioners on the estate of Adam Hobart, disallowing the plaintiff's claim. The plaintiff filed a declaration in assumpsit. Plea, the general issue; trial by the court, by agreement of parties, January Term, 1856,—UNDERWOOD, J., presiding.

It appeared that in June, 1849, one Edward Hobart and one Dubois, partners under the firm of Hobart & Dubois, were indebted to the plaintiff in the sum of \$140 for labor, and at the same time were owing the intestate a larger sum, some \$5,000. At that time Hobart & Dubois failed, and the plaintiff was about to secure his debt by attachment of property which he knew of, and which was so situated that the plaintiff could have attached it in preference to any other person, and this was known to the intestate, and he agreed, verbally only, that if the plaintiff would forbear to commence a suit and make cost by attaching the property, he would pay the plaintiff's debt; and relying on this, the plaintiff did forbear to sue, and assisted the intestate to secure his own debt, by attaching all the property of Hobart & Dubois that could be found, including that which the plaintiff had contemplated attaching.

The plaintiff made a further claim for the amount of a bank-note of about \$200, which the plaintiff and his father signed as sureties for the intestate to the Bank of Orange County. This note was made to get money to apply on a debt the intestate owed

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the appellant's father, who took the note and got it discounted at the bank. All the parties to the note were sued, and a judgment was recovered against them which the appellant paid.

It further appeared that, since the decease of the intestate, his administrator and the appellant's father had a reference of all matters in controversy, under an order of the probate court, in which the plaintiff assisted his father, and was a witness for him before the referees; and it further appeared that the father brought in said bank-note as a claim at said reference, and the same was allowed in his favor in the report of the referees; and it also appeared that the plaintiff had knowledge of the claim being so presented.

Upon the foregoing facts, the court rendered judgment for the plaintiff to recover said first mentioned claim, being the amount of the account against Hobart & Dubois, but nothing on account of said bank-note.

Exceptions by both parties.

J. P. Kidder for the plaintiff.

1. As to the claim of the plaintiff against Hobart & Dubois, the case of *Anderson v. Davis*, 9 Vt. 136, is decisive.

Where A, in consideration that B would discharge C out of custody at the suit of B, promised so to pay the debt of C, the court held that the promise was not within the statute, because the debt was gone by the discharge out of custody; 1 Saund. 211 and note s. A promise to pay a sum of money to the plaintiff, by a third person, if he will withdraw his action, is not within the statute, when there is a new and original consideration of benefit to the defendant, or harm to the plaintiff, moving to the party making the promise; and the subsisting liability of the original debtor is no objection to the recovery. *Farley v. Cleaveland*, 4 Cowen 432. A promise to pay an antecedent debt, in consideration of property placed in the hands of the promisor by the debtor, does not require a writing to give it validity. 4 Cowen *supra*; 9 do. 639; 5 Wend. 235. The effect is the same if the promisee relinquish a lien, although merely for the security of the debt itself. *Marain v. Mack*, 10 Wend. 461. 1 Smith's L. C. 329, 330. In *Williams v. Luper*, 3 Barrow 1886, the abandonment, by a landlord, of a dis-

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tress levied on the goods of the tenant was held sufficient to take a promise to pay the rent given by a broker, in whose hands the goods had been placed, out of the statute.

A verbal promise to be answerable for a debt, if the plaintiff would refrain from putting an execution against the debtor into the hands of a sheriff was binding, although the consideration was forbearance, and was so alleged in the declaration. *Russell v. Babcock*, 14 Maine 140.

The distinction seems to be, that where the promissor is benefited, the contract need not be in writing; otherwise, where it is solely beneficial to the original debtor.

2. It is a principle as old as is the law that a surety can recover of his principal for money by him paid in that capacity. The fact that the plaintiff was a witness in the reference, and was knowing to the presentation of the note as a claim by his father, did not compromise his right. He was not a party to the reference, or bound by its result,—he was a mere looker-on.

H. Carpenter and P. T. Washburn for the defendant.

1. The parol agreement made by the intestate to pay the debt of the plaintiff against Hobart and Dubois, being a promise to pay the debt of a third person, is clearly within the statute of frauds, and no recovery can be had for want of a memorandum in writing, and signed by the party to be charged. Hobart & Dubois are still liable to the plaintiff upon their original indebtedness. *Harrington v. Rich*, 6 Vt. 666. *Anderson v. Davis*, 9 Vt. 136. Chit. on Cont. 202–205. 7 Har. & J. 391. 1 Swift's Dig. 246–250. *Aldrich v. Jewell*, 12 Vt. 125. 1 Smith's L. C. 330, 332.

2. The plaintiff cannot recover the money paid on the bank-note.

Having consented to the allowance of it in favor of his father, in his reference, the plaintiff is estopped from making a claim for it in his own favor against the estate, the effect of which would be to compel the estate to pay the debt twice. The allowance to his father, with the knowledge and implied consent of the plaintiff, is a discharge of the defendant's liability to him, and the plaintiff is thereby turned over to his father for his remedy. *Hicks v. Cram et al.*, 17 Vt. 449. *Parker v. Barber*, 2 Met. 423. *Dewey v. Field*, 4 Met. 381. *Strong v. Ellsworth*, 26 Vt. 373.

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The opinion of the court was delivered by

REDFIELD, CH. J. The decisions are so conflicting upon the question what is requisite to take a promise to pay the debt of another out of the statute of frauds, that it is impossible to reconcile them. Some go so far as to say, that where the undertaking is upon any new and independent consideration, subsequent to the creation of the original debt, it is never to be regarded as within the statute. Upon this rule of construction, if the promise of guaranty of another's debt were made subsequent to the date of the original debt, it would make no difference whether it were in writing or not. For if in writing, it would not be valid, unless upon consideration ; and according to this rule, it is always valid when made subsequent to the original promise, if upon any sufficient consideration. This would virtually repeal the statute. The English cases, and most of the American cases do not go this length. But there are some of considerable weight which do. Of this class is the case of *Russel v. Babcock*, 14 Maine 140. And some cases go so far as to hold that the dissolution of a levy or attachment, in faith of a promise to pay the debt, by a third party, is not binding unless in writing. *Nelson v. Boynton*, 3 Met. 396.

The truth, perhaps, lies between these extremes, but it is not easy to define its precise limits.

It seems, however, to be admitted upon all hands, that if the new contract is one in which the original debtor is not interested, and from which he derives no advantage, and the benefit accrues, as in the present case, chiefly or altogether to the new party assuming the debt, and the contract is wholly between the new parties, it is to be treated as a new and independent transaction, and not affected by the statute. Upon this ground, although it were to be conceded that the original debt remained the same, the new contract might be enforced, as the original debt would thus virtually become that of the party thus assuming the debt. It is not, of course, extinguished as to the original debtor, but virtually becomes the property of the new party. For whether this is stipulated or not, it is in effect so, since whatever is realized upon it goes to discharge the new promise, *pro tanto*, and if nothing is collected until the new party pays the amount, it then becomes absolutely his.

It is necessary, too, that a parol promise of this kind, to be bind-

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ing, should be absolute, and not dependent on the failure of the debtor to pay, and such this is.

This case seems to us not very different, in principle, from what it would have been, if the plaintiff had surrendered a subsisting lien which he held for the security of his debt, either by pledge, or mortgage, or attachment, or levy, and had done this for the benefit of the defendant. In such case it would be strange if he could not recover. All the cases almost hold that he could.

The other claim seems to us to have been already once allowed against the estate of the defendant, in favor of a co-surety, by the plaintiff's consent.

Judgment affirmed.

JOSEPH HEMENWAY v. ELKANAH SMITH, LEONARD DAVIS AND
JACOB ORCUTT.

Evidence. Confidential communications between attorney and client. Recovery of damages for breach of an executory contract under the money counts.

A party is not obliged, as a witness, to disclose any consultation he may have had with his counsel in relation to the cause. He is equally protected, with his counsel, from testifying respecting confidential communications between them.

Damages sustained by the plaintiff from the non performance, by the defendant, of an executory contract for the purchase of property from him cannot be recovered for under the general money counts.

ASSUMPSIT. The declaration contained three counts, the first being for money had and received by the defendants to the plaintiff's use; the second for the rent, use, and occupation of the plaintiff's farm, called the Gould farm; and the third for money lent to, and paid for the defendants. Plea, the general issue; trial by jury, January Term, 1856,—UNDERWOOD, J., presiding.

The plaintiff, to sustain the issue on his part, gave evidence tending to prove that in July, 1847, the administrator on the estate of

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Daniel Gould, deceased, deeded to one Jacob Davis a farm known as the Gould farm, in Brookfield, worth about fifteen hundred dollars, subject to the widow's dower; that said farm was deeded to said Davis, at the request of the plaintiff who had bought out all the heirs to said estate but one; that said Davis paid one thousand dollars for said deed, which, upon its face, was absolute and unconditional; but that, in fact, it was only a security for the one thousand dollars; that on the day of the date of said deed, the said Jacob Davis executed to the plaintiff an agreement to sell the said farm to the plaintiff, who was then in possession of it, and so continued until the 27th of March, 1848, when he sold to the defendants the contract so made with Davis, and assigned the same in writing; and at the time of taking said assignment, the defendants paid to the plaintiff the sum of one hundred and thirty-three dollars, and thirty-three cents, in addition to the sum, expressed in said assignment, to be paid at the decease of the widow. The defendants then went into possession of said farm, and occupied the same until about the 1st of April, 1850. They paid the sixty dollars rent to said Jacob Davis for one year, and the twenty-five dollars to the widow for one year, and all the taxes for two years, leaving the rent due April 1st, 1850, and the amount due the widow after April 1st, 1849, unpaid, which last two sums the plaintiff afterwards paid to Davis. About the 1st of April, 1850, the defendants abandoned or gave up said farm, and the plaintiff thereupon made a new contract for the purchase of the same with said Jacob Davis, similar to the first, and has ever since occupied said premises. The said widow died September 8th, 1849.

The plaintiff also showed by the copies of deeds, that on the — day of October, 1853, the said Jacob Davis quit-claimed that part of said farm which lies on the west side of the road to the defendant Orcutt; and on the same day he deeded that part of said farm which lies on the east side of the road to Marshall P. Davis, as agent for the defendants Smith and Davis; but it appeared that the plaintiff had kept the possession and use of said farm without paying rent or interest to any one since the 1st day of April, 1853.

The defendants, to sustain the issue on their part, gave evidence tending to prove that the said deed of said farm by said administrator was an actual, absolute sale, and not in the nature of a mortgage

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for the security of one thousand dollars ; that there was no agreement or understanding, expressed or implied, that the plaintiff had or should have, by reason of said sale of said farm to said Jacob Davis, any interest in the same, legal or equitable, except what is contained in the agreement before referred to, which the defendants contended was a mere offer to sell. The testimony further tended to prove that previous to the 1st day of April, 1850, it was mutually agreed, by and between the plaintiff and the defendants, that the defendants might give up said farm and be released from their obligation to pay said sum of four hundred and sixteen dollars and sixty-seven cents, upon consideration that they should lose the one hundred and thirty-three dollars and thirty-three cents, which they paid at the time of taking said assignment of said contract or offer of sale ; and that thereupon the defendants did agree to lose said one hundred and thirty-three dollars and thirty-three cents, and did abandon and give up said farm, and have not had anything to do with it since. The plaintiff gave evidence tending to prove the contrary and that he did not release the defendants.

The defendant Orcutt, was a witness on the part of the defendants, and gave evidence tending to sustain the issue on their part. The plaintiff's counsel, upon cross-examination, offered to prove, by said Orcutt, that he consulted counsel soon after the suit was commenced, to ascertain whether they had a defense to said action ; and, among other things, that he inquired of said counsel, whether they had a right to abandon said contract by its original terms, without any new agreement ; and that, in consulting said counsel, he did not say or pretend to him that any such agreement had been made. To its admissibility the defendants objected on the ground that these were privileged communications.

The court overruled the objection, and the testimony was admitted, to which the defendants excepted.

The defendants' counsel contended, and so requested the court to charge the jury, that the testimony did not sustain either count in the declaration, and that the plaintiff, for that reason, was not entitled to recover ; that the plaintiff, in any event, was not entitled to recover the sixty dollars rent, due on the 1st day of April, 1850, nor the amount due the widow, after the 1st day of April, 1849 ; and that, at any rate, he was entitled, for the amount due

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the widow, only to a proportional part of the twenty-five dollars after the 1st day of April, 1849, she having died on the 8th day of September, 1849.

But the court refused so to charge, but did charge, among other things not excepted to, that if the defendants had failed to convince them that such agreement to abandon the farm and give up the contract and release the defendants had been made, as the defendant claimed, the plaintiff was entitled to recover upon his declaration; that there was no variance between the declaration and proof; that if they found for the plaintiff, they would find for him to recover the said sum of four hundred and sixteen dollars and sixty-seven cents, with interest since the 8th day of September, 1849, the sum of sixty dollars paid to Jacob Davis on the 1st day of January, 1850, with interest since that time, and the sum of twenty-five dollars paid to the widow at the same time, with interest since; and the court furnished the jury the specifications of the plaintiff's claim, upon which they would base and compute their verdict if they found for the plaintiff. The jury, under these instructions, returned a verdict for the plaintiff for the whole amount claimed. Exceptions by the defendants.

The first contract of Jacob Davis with the plaintiff, (which was designated as contract A,) was in the following words, viz.

"This certifies that the farm I bought this day of Sprague Arnold, in Brookfield, known by the name of the Gould farm, I promise to quit-claim the same to Joseph Hemenway in three years from the first day of April, 1847, if the said Hemenway will then pay me one thousand dollars, and pay me sixty dollars yearly, and every year punctually, and pay all the taxes on the farm, and pay the widow twenty-five dollars to her guardian, and clear Davis for the use of her dower, Davis having during her life; then when Hemenway pays all as above stated, when due, and saves Davis harmless from all costs and trouble on account of the farm and business of the same, then when so paid in every particular, in full and at the time, if the said Hemenway has paid as above in full, I am (at his cost) to deed the said Gould farm, and all the same to him, but if said Hemenway does not pay in full, in every particular as above stated, then this offer to sell the farm to him is of no validity, nor no offer but the former remains mine. Hemenway

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never to have this agreement unless he has fulfilled as above. The offer is left with Sprague Arnold, as trustee, never to be put into Hemenway's hands, nor is he ever to have any benefit or use of the same, unless he has fulfilled in every particular; this is never to be used or considered as any consideration, or any way, directly or indirectly, of the deed S. Arnold gave me of the farm; only I make the above offer to Hemenway to sell the same to him if he wishes to buy it. When Hemenway fails in any particular, as above, then this agreement is null; then S. Arnold, trustee, is to give the same to Jacob Davis, and then that is the end of the offer with Hemenway; then he has no claim to the farm, or offer to let him buy it. Sprague Arnold, trustee, agreed to give this to Hemenway when he shows that he has punctually paid all as above stated; but at any failure of performing as above stated, that ends this offer to sell on first failure; and Arnold, at the first failure, is to give this offer or paper back to J. Davis, which is to end the business; all cost or trouble about this offer or business Hemenway is to save Davis harmless, the which is made or caused by this business, or any way by this offer to sell to him. The proportions \$43.66 of the sixty dollars, all the taxes except highway, to be paid in June, and the \$ 25.00 to the widow, and all to be settled and paid, and certificates of the same to Arnold by the first day of April next, and each year on the 1st of April, on the offer, and is above stated. Hemingway by performing as above stated, is to have the full use of the farm during the said three years from the 1st of April, 1847. The above agreement, on my part, to be binding on me, my heirs, executors, and administrators, and assigns.

Randolph, July 10th, 1847.

JACOB DAVIS."

The plaintiff's transfer of said contract to the defendants was upon the back of the original contract, and in the following words, viz.

"Know all men by these presents, that I, Joseph Hemenway, of Randolph, county of Orange, and state of Vermont, have, and by these presents do assign to Jacob Orcutt and to Elkanah Smith and Leonard P. Davis, all of Randolph, county of Orange, and state of Vermont, all the rights and privileges reserved to me on the other side of this instrument, on condition of the said Orcutt, Smith and Davis performing the same conditions, in each and every particular, that I, the said Hemenway, am to; and also that they, the said

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Orcutt, Smith and Davis, pay to me, the said Hemenway, four hundred and sixteen dollars and eighty-seven cents, at the decease of the widow Betsey Gould. In case that the said Orcutt and Smith and Davis fail to fulfill each and every particular, as stated above, or on the other side of this instrument, then this assignment is to be null and void, as far as they, said Orcutt and Smith and Davis, are concerned. *Brookfield*, 27th March, 1848.

JOSEPH HEMENWAY."

Upon the same paper there was a written assent to the assignment, in the following words:

"Not affecting the within offer, bargain or agreement, in the least, on the other side of this paper, I consent to the above assignment. *Brookfield*, 27th March, 1848. JACOB DAVIS."

W. Hebard for the defendants.

1. In this case no money had been received, nor any representative of money, nor any equivalent. To sustain this action, it must appear that the defendants have received *money*, and not merely money's worth. Chitty on Contracts 602; *Beardsley v. Root*, 11 Johns. 464; *Cumming v. Hockley*, 8 Johns. 156; *Shepard v. Palmer*, 1 — 95, (new series.)

2. The second count is for rent, use and occupation. There is no pretence of any right of recovery under this count, unless the \$60 in the specifications would come under that head. But that being but \$60, would not justify this verdict.

3. The third count is for money lent and paid for the defendants. As no money has been paid by the plaintiff, either actually or constructively, there can be no sensible pretence for claiming a right to sustain the verdict upon *this count*.

We submit that the action should have been special, setting up the transaction as it was, and thus giving the defendants notice of what they were called upon to meet. It is difficult to suppose a case in which there would be a greater propriety or a greater necessity for so doing than in this case.

4. The court erred in compelling Orcutt to give testimony in relation to communications that he made to his counsel in relation to his defense in this suit. Such communications are privileged. If the *counsel* cannot be *permitted* to disclose them, the *client* can-

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not be compelled to do the same thing, for it is the *client* and not the *counsel* that is to be protected. 2 Starkie Ev. 394, also see notes; *Dixon v. Parmelee*, 2 Vt. 185; *Durkee v. Leland*, 4 Vt. 612. That the witness has ceased to be counsel does not alter the rule; 2 Starkie Ev. 395.

L. B. Peck and *P. Perrin* for the plaintiff.

1. The transaction between Davis and the plaintiff constituted a mortgage. The plaintiff had an equity of redemption in the premises. The relation of mortgagor and mortgagee existed between him and the plaintiff. This court so held at the last term in this county.

2. The plaintiff then had an interest in the premises which he might sell and transfer. His interest was assigned to the defendants. Under this assignment they took possession and occupied. This bound them to perform the conditions on which the assignment was made. The only question of fact submitted to the jury was whether the contract had been abandoned by the agreement of the parties. This fact was found against the defendants, and the jury returned a verdict for the plaintiffs. There was no error in the charge on this point.

3. The defendants insisted that the evidence did not tend to support the declaration. This objection was insisted upon as one of variance. The court so understood it, as is evident from the charge. But the evidence did tend to support the declaration. The money paid by the plaintiff to Davis for interest and the widow's rent, was money paid to the defendants' use, as they had agreed to pay it. This amount was clearly recoverable under the count for money paid. The defendants, by accepting the bond and assignment, became liable to perform the stipulations of both. They made and admitted themselves liable for the payment of the money to the plaintiff. May it not be treated like a note, as evidence of money received to the plaintiff's use?

The opinion of the court was delivered by

BENNETT, J. We think Orcutt, though made a witness by the statute, cannot be compelled to disclose any consultation which he may have had with his counsel in relation to the cause.

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Ev. (The rule should be the same as it would have been if the counsel had been called to prove the consultation.)

We do not see that it is possible for the plaintiff to recover upon his present declaration for the four hundred and sixteen dollars and eighty-seven cents, which, by the terms of the assignment of the contract A, the defendants were to pay the plaintiff upon the decease of Betsey Gould. The consideration for this promise grows out of the assignment of that contract to these defendants by Hemenway. The contract is *executory*, and the plaintiff's claim, in this particular, if he has any, must be for damages for the non-performance of the contract by the defendants, and, by a special action on the contract. Nothing like money, as to this item of claim, has been had and received by the defendants, to the use of the plaintiff; nor lent and advanced by the plaintiff for the defendants. As to the items of sixty dollars and of twenty-five dollars, which the plaintiff paid to Davis, and which the defendants had bound themselves to pay, by the provisions in the assignment of the lease from Hemenway to them, we see no reason why the money counts are not adapted to so much of the plaintiff's claim, if he has one that can be established, and, as the case must, at all events, be opened, we are not disposed to express any opinion on this part of the case. The objection to these items seems to be that the plaintiff was not responsible to Davis for them, he having assented to the assignment of the lease by Hemenway to the defendants, when the same was made; and that the *annual annuity* to be paid the widow was not *apportionable*.

Judgment reversed and the cause remanded to the county court.

Sleeper v. Pollard.

BOYDEN S. SLEEPER v. THOMAS POLLARD.

Change of possession. Attachment.

The defendant bought of W. a bay of hay in a barn on a farm which W. occupied and carried on by his hired man, and removed a part of it, and requested W.'s hired man to take care of the remainder for him, which the hired man, with the knowledge of W., agreed to do. The rest of the barn was occupied with other hay and property of W. *Held*, that there was not a sufficient change of possession of that part of the bay of hay that remained to protect it from attachment by W.'s creditors.

TRESPASS for a quantity of hay. Plea, the general issue; trial by jury, January Term, 1856,—UNDERWOOD, J., presiding.

The plaintiff, as deputy sheriff, attached the hay in question as the property of William Woodman upon a writ against him in favor of George Sleeper. The hay was in a barn on the Dwight farm, so called, in Vershire, which Woodman carried on during the year of the attachment by one Kelley, who lived on the farm at the time of the attachment, and worked on it by the month. Woodman cut the hay on the farm, and put part of it in a bay upon some old hay cut on the farm the year previous, which he had bought of Dwight. Kelley remained on the farm, as Woodman's hired man, after the hay was cut, and gathered in the other crops, such as potatoes, corn and apples, Woodman himself having gone to New York just before the attachment.

It appeared that on the 17th of August, 1854, Woodman sold said bay of hay to the defendant Pollard, and gave him a bill of sale of it, and that the defendant paid, at the time, \$8 per ton, the weight being estimated by measurement; and the testimony tended to show that Pollard drew away a part of the hay before the attachment, and a part after; and that when Woodman sold the hay he told the defendant it might remain in the barn until he was ready to draw it away; and that, in the presence of Woodman, the defendant requested Kelley to take care of it for him, and that Kelley said he would. It appeared that, after the sale, and after the attachment, Woodman had other hay and other property, a horse, cart, plow, and other crops, as before stated, and a yoke of oxen and a lot of mining tools, on the farm and in and about the barn.

The defendant requested the court to charge the jury that if they

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found that Kelley, at the time of the sale, agreed with the defendant to take care of the hay for him until he should draw it away, and that this was known to Woodman, that there was such a change of possession that the hay was not liable to attachment by Woodman's creditors, and that the defendant was entitled to recover. But the court declined so to charge, and decided that the evidence did not show such a change of possession as would protect the hay from attachment, and instructed the jury that the plaintiff was entitled to recover for that part of the hay, and that only, which was removed by the defendant after the attachment. To this charge of the court, and to their refusal to charge as requested, the defendant excepted. Verdict for the plaintiff.

Peck & Colby for the defendant.

A. M. Dickey for the plaintiff.

BY THE COURT, REDFIELD, CH. J. It does not appear to us that there was any such change of possession, in the present case, as the law requires to protect the property from attachment.

It was in the barn of the debtor, or one in his possession, or that of his hired man, which is his possession in law; and it remained there until the attachment, nothing being done to indicate a change of ownership, except to request the hired man to take care of it for the purchaser, he still continuing in the employ of the debtor. This, certainly, could not be regarded as a visible, substantial change of possession.

The case seems to us, in principle, and in many of its leading facts, very similar to that of *Beattie v. Robin*, 2 Vt. 181, and *Judd v. Langdon*, 5 Vt. 231.

Judgment affirmed.

McK Ormsby v. Morris.

ROBERT MCKORMSBY v. LEWIS R. MORRIS.

Jurisdiction. Pleading.

The county court has jurisdiction of an action on the case against an officer for not keeping property attached by him so as to be levied on, though the judgment obtained be for less than one hundred dollars, if the damages demanded and actually recovered, including interest to the time of trial, exceeds that sum.

In such an action it should appear from the declaration that the property was charged by execution within thirty days from the rendition of the judgment, and a declaration is insufficient, on demurrer, if it only appears from it that the judgment was rendered at a term of the court commencing March 23d, and that execution issued dated March 29th, and that it was in the officer's hands on the 26th of April following;—it not appearing at what time the court adjourned, and there being no intendment from the date only of the execution that it issued at the earliest period that it might.

ACTION ON THE CASE. The declaration set forth the issuing of a writ in the plaintiff's favor against one Levi Gilman; and the attachment by the defendant, as a constable, of certain specified property thereon; the recovery of a judgment in the county court in the plaintiff's favor, in the suit commenced by said writ, and then proceeded as follows, "and from the decision of the county court last aforesaid, said Gilman, by his exceptions, carried and removed said suit to the supreme court of the state, to be held at Chelsea, in said Orange county, on the 15th Tuesday after the 4th Tuesday of December, 1851, to wit, on the 23d day of March, 1852, when, by the consideration of the supreme court, the plaintiff's judgment was affirmed to him, with additional damages and costs to the plaintiff aforesaid, for the sum of sixty-nine dollars and nine cents damages or debt, and sixteen dollars and thirty-two cents costs, in all, as by the records of said court remaining will appear; and the plaintiff prayed out his writ of execution on said judgment, dated the 29th day of March, 1852, returnable in sixty days, and directed to any sheriff or constable in the state, all in the form prescribed by law; and the plaintiff says that the said goods of the said Gilman, so attached as aforesaid, were duly demanded of the said defendant by the plaintiff, to wit, on the 20th day of April, 1852, at Brookfield aforesaid; and the plaintiff further also says that he delivered the said writ of execution to Chas. C. P. Baldwin, a legal deputy of the sheriff of said county of Orange, who, by virtue thereof, afterwards, to wit, on the 26th day of April, 1852, at Brookfield afore-

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said, made demand of the goods of said Gilman, by the defendant so attached as aforesaid, but the said Morris did not retain and keep the said goods for the space of thirty days after said execution was issued, to the end that the plaintiff might take them in execution to satisfy the same, but released and discharged said goods from attachment," &c., &c., "to the damage of the plaintiff two hundred dollars."

The defendant moved to dismiss the suit for want of jurisdiction of the county court. The motion was overruled, and the defendant then demurred to the declaration. The county court, January Term, 1856, overruled the demurrer, and rendered judgment for the plaintiff. Exceptions by the defendant.

R. McK Ormsby for the defendant.

The county court had no jurisdiction of the action in this case. The only damage claimed in the declaration is the amount of the judgment, and the costs, which are less than one hundred dollars. *Maxfield v. Scott*, 17 Vt. 634.

The declaration is defective. To charge the defendant, as an officer, with care of property attached, there should be allegation that execution was issued in thirty days from the rendition of judgment, and placed in his hands, or in the hands of some proper officer, and demand made of him in that time; 12 Vt. 599.

C. B. Leslie for the plaintiff.

The defendant has put in a general demurrer. The declaration is in accordance with the precedents; Swift's Dig. 452; Anthon's Precedents 304, No. 49.

The declaration expressly alleges a demand of the property attached, by the officer holding the execution, of the defendant; and sets forth the time, which is within the time required by law. The declaration charges as follows, "and the plaintiff further also says that he delivered said writ of execution to Charles C. P. Baldwin, a legal deputy of the sheriff of said county of Orange, who, by virtue thereof, afterwards, to wit, on the 26th day of April, 1852, at Bradford aforesaid, made demand of the goods of the said Gilman, by the defendant so attached as aforesaid, but said Morris did not retain and keep said goods, &c., but released and discharged

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said goods from attachment, and did not deliver said goods to said Chs. C. P. Baldwin, deputy sheriff as aforesaid, when demanded."

When the breach of a contract is set out argumentatively, or there is uncertainty in pleadings, it can only be reached by a special demurrer; *Catlin v. Lyman*, 16 Vt. 44.

The opinion of the court was delivered by

BENNETT, J. The county court were correct in not dismissing the cause for want of jurisdiction. The action sounds in tort, the damages are laid at \$200, and the recovery was, in fact, for more than \$100, including the interest on the execution.

But a more important inquiry arises on the sufficiency of the declaration. To sustain this action for the neglect of the officer in not keeping this property so that it could be levied upon, it is necessary that the property should be charged in execution within thirty days from the time of final judgment. This, from the declaration, does not appear to have been done. All that is alleged is, that the court, when the judgment was rendered, sit on the 23d day of March, 1852, that execution was taken out bearing date the 29th of March, 1852, and that the officer demanded the property of the defendant on the 26th day of April, 1852, and there is no averment that this was within thirty days from the time of the rendition of the judgment, and no averment of the day on which the court adjourned. It may have been in session but for a single day. The fact that the execution bears date the 29th of March, 1852, is no evidence of the time the court adjourned.

It cannot be *intended* that it issued at the earliest period at which the plaintiff was entitled to take his execution. If the statute had fixed the day for the ending of the term, as well as the day for the beginning, we might, perhaps, take judicial notice of the day when the court adjourned, and, in this way, save the declaration, but as the ending of the term is not fixed by law, its termination must be matter of *averment and proof*.

Judgment of the county court is reversed, and judgment that the declaration is insufficient.

The plaintiff had liberty to amend on the usual terms.

State v. Fisher.

THE STATE OF VERMONT v. SAMUEL G. FISHER.

Quo warranto to prevent a person from holding the office of justice and postmaster at the same time.

The supreme court will not ordinarily interfere by writ of *quo warranto*, or otherwise, to prevent a person from holding the office and exercising the powers of a justice of the peace while he has the appointment of, and is acting as a postmaster.

If they would, the present proceeding could not be sustained, there being no proof that the respondent has acted as postmaster during the year for which he has been elected a justice.

INFORMATION, by the state's attorney of the county, setting forth that the respondent was holding and exercising the office of postmaster in the town of Orange, being an office of profit and trust by and under the authority of the congress of the United States, and that he had been elected to, and was holding and exercising the office of justice of the peace for the county of Orange, being a judiciary office, under the authority of this state, for the year commencing December 1st, 1855; and praying the consideration of the court in the premises, and that due process of law might be awarded against the respondent, to answer by what warrant and authority he claimed to hold, exercise and enjoy the last named office.

A copy of the respondent's commission, as postmaster, certified by the postmaster-general of the United States,—a certificate from the secretary of state of Vermont, showing the election of the respondent as a justice of the peace, and an affidavit showing that he had acted as a justice were filed in evidence.

A. Howard, Jr., state's attorney, in support of the motion.

I. The constitution of this state, part 2, § 26, declares that "no person holding any office of profit or trust under the authority of congress, shall be eligible to any appointment in the legislature, or of holding any executive or judiciary office under this state."

The office of postmaster is an office both of profit and trust, under the authority of congress, and the office of justice of the peace is a judiciary office under this state. Most of his powers and duties are of a judicial nature, and concern the administration of justice. *McGregor v. Balch et al.*, 14 Vt. 428.

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II. *Quo warranto* is the only way to remove any one who has usurped, and is unlawfully holding and exercising any office under this state. *McGregor v. Balch*, 14 Vt. 428 ; 3 U. S. Dig. 311 ; 2 N. Y. Dig. 264 ; Big. Dig. 406 ; 1 Swift's Dig. 567.

————— for the respondent.

BY THE COURT, REDFIELD, CH. J. This is a petition by the state's attorney for leave to file an information, in the nature of a *quo warranto*, against the respondent, for exercising the functions of the office of justice of the peace and postmaster at the same time.

The proof shows that he was elected justice of the peace for the county of Orange, for the present year, and is acting as such, and that he was appointed postmaster, and accepted the office in April, 1852, but there is no distinct proof of his having acted as such since the first of December last, and upon this ground alone we should be compelled to dismiss the petition.

But as this is a defect readily supplied, we ought to say perhaps, that we should still decline to interfere.

We regard this proceeding, like writs of mandamus and other prerogative writs, as resting altogether in discretion, and there are many reasons why we should not interfere.

1. The office is of very small importance, there being nearly two thousand in the state.

2. It is but for one year, and in Massachusetts, and some other states perhaps, the supreme court refuses to interfere by writ of *quo warranto*, upon that ground alone ; the time being scarcely sufficient to determine the case, before the office will expire, and in the present case, the term is already considerably abridged.

3. Here is no other person who complains of being deprived of the office which is exercised by the respondent.

4. The objection is of no considerable practical importance. It may be, and probably is a technical objection. But it is in vain to argue that the objection is really of any practical weight. It might have been deemed important when it was first adopted, before the working of the general and state governments had become fully understood, and it might now be viewed of more weight in reference to

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offices of mere emolument, but in fact, a man's fitness to act as justice of the peace is very little affected by any amount of patronage or emolument resulting from the office of postmaster in any town in this county. And if the people choose to elect one a justice under such circumstances, I should hardly think it a proper occasion to interfere and save them from a technical violation of their state constitution.

If this were a case seriously affecting public interests or private rights, or where others claimed to be deprived of office by the usurpation, or where the rights of great moneyed corporations, as to their management and control, were seriously brought in question, and large pecuniary interests were involved, or the quiet of a large district depended upon the legal determination of the questions at issue, we should not hesitate to interfere and settle such questions, as we did in this county upon a former occasion, and have since done in another county. But nothing of this kind exists in the present case. The purpose to be accomplished is, in our judgment, quite too insignificant to justify the resort to any such prerogative suspension and control by this court.

Petition dismissed.

JOHN STONE, apt. v. *The Estate of* DANIEL PEASLEY.

Notice of proceedings in the probate court. Distribution of estates; qualification of decrees respecting, after they have been carried into effect.

Notice must be given to all persons interested in the distribution of an estate, or in an apportionment of an undivided fund, in the hands of a guardian, belonging to two or more of his wards, of any proceedings before the probate court making such a distribution or apportionment; or altering or modifying one previously made.

The proceedings of the probate court in the present case, in revising their previous determination as to the proportion of an undivided fund in the hands of a guardian, which one of the two wards of such guardian was entitled to, held invalid

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on account of there having been no notice of the proceeding given to the representatives of the other ward who had previously deceased.

Quære. Whether a decree of the probate court for the distribution of an estate can be altered or modified after it has been carried into effect.

A probate court distributed an estate exclusively to the heirs of the full blood, taking no notice of the half blood heirs, who were, in law, equally entitled to their proportion. *Held*, that the title to the estate was beyond the control of the probate court, after the full blood heirs had taken possession, in pursuance of the decree. ——— v. ———, Orleans county, cited by REDFIELD, CH. J.

Distinction between such cases and those in which the probate court have reviewed and revised the settlement and allowance of an administrator's account;—and the grounds of the proceeding in the latter class of cases considered.

APPEAL from the disallowance of a claim made by the appellant against the estate of the intestate. The cause was referred, and, from the report of the referee, the following facts appeared.

By the will of Daniel Peasley, sen., the father of the intestate, which was probated January 18, 1828, three-fourths of his property, after providing for his widow, was given to his son, the intestate; and the other fourth was to be equally divided between his daughters, Lucy Ann Peasley and Laura Ann Peasley. The appellant was appointed guardian for the intestate, and also of the said Lucy Ann and Laura Ann, all of them being minors, and received the property to which they were entitled from their father's estate. At the expiration of his guardianship for Lucy Ann, the eldest of the three children, he settled his account and paid over, as her share, one-eighth of the property which came into his hands; and on the 29th of November, 1843, the said Laura Ann having become of age, he settled in the probate court his account as guardian, both of the said Laura Ann and of the intestate, and by a decree of that court he was directed to pay, and did pay over to the said Laura Ann one-eighth of the fund in his hands then belonging to the two wards, Laura Ann and the intestate. Subsequently one B. W. Bartholemew was appointed guardian for the intestate, and the appellant paid over to him the remaining seven-eighths of the fund, which was paid over by the said Bartholemew to the intestate, upon his becoming of age. The intestate died in March, 1854, and administration was duly granted upon his estate, and commissioners appointed. In September, 1854, an application was made to the probate court by the said Laura Ann, setting forth,

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and, upon an examination and hearing by said court, it was found and adjudged that, upon the settlement made in November, 1843, the said Laura was, in fact, entitled to one-seventh instead of one-eighth of the fund then in the appellant's hands, as guardian for the said Laura Ann and the intestate, and that the decree ought to be reformed in that respect; and the probate court thereupon so ordered and further decreed that the appellant pay to the said Laura the difference between said eighth and said seventh part, amounting to \$146.81. The appellant was duly notified of this application, but no notice of it whatever was given to the administrator of the intestate. The appellant claimed an allowance against the estate of the intestate for the amount of the decree of the probate court in favor of the said Laura Ann against him. The referee found that, in fact, the said Laura Ann was, upon the settlement in 1843, entitled to one-seventh instead of one-eighth part of the guardianship fund then in the appellant's hands, but submitted to the court whether, upon the facts as above stated, the appellant was entitled to an allowance of his claim against the intestate's estate.

The county court rendered judgment, upon the report, in favor of the appellant, to which the appellees excepted.

Peck & Colby and *Dickey* for the appellees.

The decree of the probate court, on which the plaintiff founds his claim to recover, is a nullity. It was made without notice to the representatives of the intestate, who are not to be affected by a proceeding of which they had no notice. Comp. Stat. p. 368, § 8; 1 D. Chip. 357; *Chase v. Hathaway*, 14 Mass. 221; *Hathaway v. Clark*, 5 Pick. 490; *Burd v. Pratt*, 18 do. 115; *Conkey v. Kingman*, 24 do. 115.

If the orders of the probate court, and settlement made prior to the last order, can be, at this late day, varied by proceedings in that court, it can only be legally done on notice to all interested. Can it be done at all? *Field v. Hitchcock*, 14 Pick. 405.

C. W. Clarke and *W. Hebard* for the appellant.

The probate court have power to correct errors in their decrees after lapse of time short of twenty years. *Heirs of Smith v. Rix Admr.* 9 Vt. 240; *Adams et al. v. Adams et al.*, 21 Vt. 162.

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It is not matter of error that the probate court did not notify the other party of the application to have the error corrected. The statute does not require notice in such cases; and when it is in the *discretion* of the court to give notice or not, their proceedings are valid.

The opinion of the court was delivered, at the circuit session in October, by

REDFIELD, CH. J. There are numerous questions involved in this case, more or less preliminary to the main question, which, being decided in favor of the appellees, would lead to a new trial, without determining the main question, and as they have all been fully argued, it seems important, as far as consistent, to determine them now.

I. A question is made in regard to the extent of the operation of this remodelling of the decree of 1843, whether it is binding upon the estate of Daniel Peasley, there being no general notice given, and no special notice to any one but the appellant. The statute seems to require special notice to all the parties interested in the distribution of estates; and reason would certainly indicate the necessity of such notice. Indeed all judicial proceedings, without constructive notice, at the least, are altogether inoperative. There being, then, no notice to the appellees of the application for remodeling of the decree of 1843, we think they may stand upon the original decree, or, at all events, they are not concluded by the new decree of 1854.

II. It seems to us a question of some difficulty whether such a decree as that of 1843, is susceptible of modification by the probate court, after being carried into effect. A decree of distribution of an estate, when once executed, vests the property, and puts it out of the control and appropriate jurisdiction of the probate court.

Property once fully administered upon is as effectually out of the jurisdiction of the probate court as it ever can be. After property is once vested, in obedience to a judicial sale or decree, it would certainly involve a very strange anomaly, if the title could be modified or defeated by any after proceedings of the same tribunal, and especially *ex parte* proceedings. A sale by a sheriff, after it is once ended, is certainly beyond his control. If he sell one-seventh

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of an estate or personal chattel, it is certainly not in his power subsequently to compel the purchaser to accept of an eighth part, upon any new discovery in regard to the title, or his authority. So too of a sale by a master in chancery, or a receiver, or any other public officer. Good faith demands that title to property, acquired by judgment of a court of competent, and especially of exclusive jurisdiction, should not be liable to any failure or modification.

Hence this court held, in a case in Orleans county, many years since, after two arguments, that a decree of distribution of real estate exclusively to the heirs of the full blood, taking no notice of the half-blood heirs in the same degree, who were at law equally entitled to share in the estate, could not, after possession had been taken of the estate by those to whom it had been decreed, upon petition of the heirs excluded from their share in the estate, be so modified as to give the property to those originally entitled to it. And a decree of the probate court making a new distribution of the estate, as it originally should have been made, affirmed in the county court, was set aside in this court, upon the ground that the first decree, and possession taken under it, put the title beyond the control of the probate court.

III. The cases of *Smith's heirs v. Rix, Admr*, 8 Vt. and S. C. 9 Vt., and *Adams v. Adams*, 21 Vt., where decrees of the probate court were modified by that court and affirmed in this court, stand upon somewhat peculiar grounds which do not apply in this case.

1. These cases are all decrees upon the settlement of administrator's accounts, where the proceeding is, in effect, *ex parte*, the administrator partially representing both sides, although, in contemplation of law, the heirs or creditors may appear. See case of *Adams v. Adams*, 22 Vt. Hence such decrees are not of the same conclusiveness as decrees of distribution, or indeed as ordinary judgments and decrees, where both parties in interest are represented.

2. These cases are, so far as they hold decrees of the probate court liable to revision, confined to questions not passed upon in a former decree, as cases of fraud, &c., such as will justify a court of equity in setting aside a contract, or modifying or even vaca-

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ting a decree of the same court. *Harris v. Hardiman*, 14 How. ard 334. We mean, doing this, in effect, by enjoining the party.

8. They are based upon very questionable grounds of policy, and ought not to be extended beyond similar cases in all respects.

We think, therefore, this judgment must be reversed, and upon the report of the referee, judgment entered for the appellees.

THE ASCUTNEY BANK, THE BANK OF NEWBURY AND THE
ORANGE COUNTY BANK v. ROBERT MCKORMSBY.

*Action upon promise to furnish security for purchase money of
real estate. Statute of frauds.*

If the purchaser of property, which is conveyed to him, promises but neglects to furnish security for the payment, at a future day, of that part of the purchase money which is unpaid, an action may immediately be commenced and maintained against him for its recovery.

In such an action the declaration should be special and count upon the promise to furnish security; and the rule of damages would be the sum to have been secured.

If the seller declines to make a transfer of the property until the security is furnished but the purchaser fraudulently obtains the possession of it, (or of the deed of it, if real estate, as in the present case,) the seller may waive the tort, and maintain an action on the promise to furnish security.

In a contract for the sale of real estate, a deed of which is executed and delivered, a promise by the purchaser to pay the consideration or furnish security for it, is not within the statute of frauds; and, if only by parol, an action may be maintained upon it.

ASSUMPSIT. The declaration alleged that the plaintiffs offered for sale at public auction a piece of real estate in Bradford, the conditions of the sale being that one-third of the purchase money should be paid down, and satisfactory security given for the remainder, payable one-half in one, and the other half in two years, upon the furnishing of which, by a given day, a deed and the possession of the premises was to be given; that the defendant was the highest bidder for, and was declared the purchaser; that the defendant did pay one-third part of the purchase money, but did not and

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would not furnish security for the remainder, though the plaintiffs had executed to him a valid deed of the premises, which they were ready to deliver upon his complying with the conditions of the sale, but that the defendant fraudulently obtained said deed from the possession of the plaintiffs, and caused it to be recorded, and then took possession of and had since occupied said premises,—but had ever refused to pay or secure the balance of the purchase money.

The defendant plead in bar that the promises relied upon in the plaintiff's declaration were contracts for the sale of land, and that no agreement in reference to them, nor any memorandum or note thereof, was in writing, or signed by the defendant, or by any person by him authorized, &c.

To this plea the plaintiffs replied the execution by them and the obtaining by the defendant of their deed, and his taking possession of said premises, &c., and to this replication the defendant demurred.

The county court, June Term, 1855,—POLAND, J., presiding,—adjudged the replication insufficient, to which the plaintiffs excepted.

C. W. Clarke and P. T. Washburn for the plaintiffs.

1. The defendant's refusal to give security, in accordance with the contract, absolved the plaintiffs from all obligation to give time and entitled them to sue at once; *Gilman v. Hall*, 11 Vt. 510; *Eddy v. Stafford*, 18 Vt. 237; *Tyson v. Doe*, 15 Vt. 571.

2. The replication is a sufficient answer to the plea of the statute of frauds; *Philbrook v. Belknap*, 6 Vt. 383; *Bowen v. Bell*, 20 Johns. 338; *Wilkinson v. Scott*, 17 Mass. 249; *Brackett v. Evans*, 1 Cush. 79; *Preble v. Baldwin*, 6 Cush. 554; *Hibbard v. Whitney*, 13 Vt. 28; *Thayer v. Viles*, 23 Vt. 497.

R. McK Ormsby pro se.

1. The action in this case counts on the contract, and claims damages for its breach. The contract is for the sale of land. Without being in writing no action will lie on such contract; Comp. Stat. chap. 64, § 1.

It is sometimes said that the complete execution of the contract by the vendor entitles him to an action for the money. This, in some cases, according to the American cases, may be so; but the money must be due, so that debt or general assumpsit will lie for

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it. There is no case where it has been held that an action will lie for the breach of the contract in such cases; *Cocking v. Ward*, 1 C. B. 858; 12 *id.*, reported in 10 Eng. Law & Eq. 521; *Davis v. Farr*, 26 Vt. 592; 13 Vt. 21; *Kidder v. Burt*, 1 Pick. 328.

8. When such a contract has been executed by the vendor, it has been held, a promise to pay the purchase money is implied by law from the execution and acceptance of the conveyance, on which implied promise an action of general assumpsit will lie; Parsons on Contracts, vol. 2, p. 315-319. This is the only theory that can be found for the American decisions on this subject; but is a theory based upon these decisions, and not on the principles of the common law. The common law teaches that promises are only implied in the absence of contracts.

The opinion of the court was delivered, at the circuit session in October, by

ISHAM, J. It is unnecessary to say, in this case, what would have been the plaintiffs' right, had they instituted proceedings to recover the possession of the premises, or to avoid the deed which, it is admitted by the demurrer, was fraudulently obtained from them and placed on record. The plaintiffs had the right to waive the tort under which the deed was obtained, and treat the premises as having been conveyed under their contract. It is not for the defendant to object to that course, or claim any advantages he otherwise would not have had, arising from his wrongful act in obtaining the deed and the possession of the premises in that manner. It was competent for the plaintiffs also to waive their right to retain the deed in their possession until the securities for the payment of the balance of the purchase money was deposited with them as stipulated. If they saw fit to deliver the deed before the securities were furnished, or to treat the deed then in the possession of the defendant, as having been delivered under their contract, they had a right so to do, and to hold the defendant to the performance of his contract. In commencing this suit to recover the price agreed to be paid for the premises, the plaintiffs proceed upon the ground that the deed has been delivered, that the defendant has acquired a title to the premises under it, and that they now rely upon the defendant's promise to pay the stipulated price for the land con-

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veyed to him. In thus treating the matter as a contract, the plaintiffs must take the contract altogether, and be bound by all its provisions. If the defendant, at the time the request was made, or at any other time within the period limited by the contract, had furnished the securities for the balance of the purchase money, it is clear that this action could not be sustained. The defendant would have been entitled to the whole time of credit for the payment of the money, as it was stipulated when the purchase was made, and no action, in the interim, could have been sustained. *Strutt v. Smith*, 1 Crom. Mees. & Ros. 312; *Ferguson v. Carrington*, 9 Barn. & Cres. 59. But the neglect and refusal of the defendant to furnish the securities when requested for that purpose, or within the time stipulated, will prevent the defendant from claiming the benefit of the stipulated credit. The plaintiff has the right, on such a refusal, to commence his action immediately, and recover the balance due. In such case, the declaration should be special on the contract to furnish the security, and not in general assumpsit, and the rule of damages will be the sum agreed to be paid. *Eddy v. Stafford*, 18 Vt. 237; *Mussey v. Price*, 4 East 147; *Hinckly v. Hardy*, 7 Taunt. 312.

In relation to the question arising under the statute of frauds, it is sufficient to observe that this question has been decided by this court, during the present circuit, in the case of *Hodges & Wife v. Green*, ante p. 358. We can add nothing more upon that question to what was said in that case. The English authorities sustain the general principle, that a promise to pay the consideration money on the sale of an interest in real estate, is within the statute and void, at law, unless the promise is in writing. The case of *Cocking v. Ward*, 1 Man., Gran. & Scott 858; *Kelly v. Webster*, 10 Eng. L. & Eq. 517, and *Smart v. Harding*, 29 Eng. L. & Eq. 252, are very decisive as to the English rule on that subject. The courts of that country will sustain no action on the express contract for the money agreed to be paid on the sale of land, unless in writing. But, if there has been a subsequent acknowledgment of the debt, they will allow a recovery on that evidence, under the general counts, for the amount due. The rule in this country, and particularly in this state, is otherwise; and where the land has been conveyed, and the contract fully executed on the part of the grantor, and nothing re-

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mains to be done but the payment of the stipulated price for the land, an action at law can be sustained. *Bowen v. Bell*, 20 Johns. 338; *Wilkinson v. Scott*, 17 Mass. 249; *Brackett v. Evans*, 1 Cush. 79; *Preble v. Baldwin*, 6 Cush. 554; *Hibbard v. Whitney*, 13 Vt. 21; *Thayer v. Viles*, 23 Vt. 497; *Davis v. Farr*, 26 Vt. 596. In such case, all that part of the contract which was within the statute of frauds has been performed by the execution and delivery of the deed. The contract to pay the money, in such case, is not within the statute. We think the replication is a sufficient answer to the plea, and that the plaintiffs are entitled to recover the balance due on that purchase.

The judgment of the county court must be reversed, and judgment rendered for the plaintiffs.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF LAMOILLE.
AT THE
APRIL TERM, 1856.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

R. H. VAN BUSKIRK, *Apt. v. J. C. MARTIN and his trustee*
B. D. B. FOSTER ; L. T. MARTIN, *Claimant.*

Appeal. Trustee process.

The plaintiff in a trustee suit before a justice, the subject-matter of which is appealable, may appeal from the judgment of the justice in reference to the liability of the trustee, where the principal defendant is defaulted.

TRUSTEE SUIT, commenced before a justice of the peace and appealed.

Van Buskirk v. Martin & Tr.

In the county court, L. T. Martin who had appeared as claimant moved that the cause be dismissed for that "said cause was originally brought before a justice of the peace, and that said principal defendant was defaulted by said justice, and said trustee was discharged by said justice, and this court has no appellate jurisdiction of said cause."

The county court, May Term, 1855,—PECK, J., presiding,—found the facts to be as stated in the motion to dismiss, in reference to the disposition of the cause before the justice, but overruled the motion, to which the claimant excepted.

J. A. Child for the claimant.

————— for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. The question in the present case is whether the plaintiff, in a trustee suit before a justice, where the action against the principal defendant is defaulted, and the trustee discharged, is entitled to an appeal upon the question of the liability of the trustee.

Where the trustee is adjudged liable the statute gives the trustee the right to appeal. This statute was passed in 1842, in consequence of the decision of this court denying that right to the trustee, (14 Vt. 320.) But from the first, after jurisdiction in trustee cases was given to justices, the general provision giving either party the right to appeal was held to extend to the question in regard to the liability of the trustee. And the statute of 1842 was passed to give the trustee the same right of appeal upon the question of his liability which the statute, under the construction of this court, already gave the principal parties to the action. The statute certainly would have been a very one-sided affair to have extended a right of appeal to the trustee which was denied to the plaintiff, the antagonist party upon that issue. The words of the statute show this to have been the general purpose and intention of the act, to put trustees, in regard to the right of appeal, upon the same ground as other parties to the suit. The appeal was allowed to the claimant, by the decision of this court (23 Vt. 504,) upon the

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same ground that the parties to the suit had the right to appeal upon the question of the liability of the trustee, and that the statute having made the claimant a party, he was entitled to all the rights incident to the general relation of a party. And the legislature having, by express statute, conferred the right of appeal upon the trustee, it was very obviously their purpose in making the claimant a party to this question, to confer upon him all the rights incident to other parties to this part of the case.

The only question remaining, then, is whether the right to appeal, in this case, is affected by the principal action being defaulted. We think not. That only affects the right of appeal upon that portion of the action. But the issue of the liability of the trustee is a distinct issue, and chiefly between the plaintiff and the claimant, and each has the right to appeal this question when the subject matter of the principal action is appealable, whether it be in fact appealed or not.

Judgment affirmed.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF ORLEANS,

AT THE

APRIL TERM;

AND AT THE

CIRCUIT SESSION, IN SEPTEMBER, 1856.

PRESENT,

HON. ISAAC F. REDFIELD, CHIEF JUDGE.

HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.

HON. MILO L. BENNETT, }

HENRY B. PERKINS v. JESSE COOPER.

Audita querela. Pleading.

Audita querela may be maintained to set aside the judgment of a justice taken, by default, after an agreement to discontinue the suit, or after negotiations from which the defendant understood that it was so agreed, the plaintiff knowing that the defendant so understood it.

An averment, in a writ of *audita querela*, that the complainant, believing that the suit would not be entered in court, did not attend to defend the same, and that thereupon the defendant fraudulently procured judgment by default, *held*, after

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verdict, as equivalent to an allegation that the complainant absented himself from the trial under the expectation and confidence that the suit was to be discontinued, and that the defendant, knowing that he acted upon that confidence, procured the judgment by default.

AUDITA QUERELA to set aside a judgment rendered by a justice of the peace in favor of the defendant, against the complainant, by default. The complaint alleged that the writ in said suit, made returnable before Joseph Higgins, Esq., justice of the peace, on the 5th of June, 1846, was served on the complainant on the 18th of May, 1846; and that on the 19th of May the parties in interest agreed to submit the subject matter of it to arbitration, &c.; and that "the said Perkins, believing said suit would not be entered in court, did not attend to defend the same, and the said Perkins was then and there, by the fraudulent procurement of the said Cooper, by the said justice Wiggins three times called in open court, and, not appearing to answer to said action, was defaulted by said court, and the said Cooper fraudulently procured the said justice Wiggins to render up a judgment against your complainant and in favor of the said Cooper for," &c. Plea, the general issue; trial by jury, June Term, 1855,—UNDERWOOD, J., presiding.

The complainant introduced in evidence certified copies of the writ, judgment, &c., described in his complaint, with testimony tending to prove that one Solomon Steele was the party in interest as defendant in that suit, upon whom the complainant relied to attend to it, paying no attention to it himself after notifying Steele of its commencement; and that, a few days after the suit was commenced, the defendant and Steele agreed to submit said suit, and the subject matter of it, to the arbitrament of J. L. Edwards and E. G. Johnson, and that the suit should be discontinued; the defendant promising to abide by the award, and Steele promising to pay whatever should be awarded in the defendant's favor. There was conflicting testimony upon this point, as to the extent of the submission, and also in reference to the proceedings before, and the award of the referees, which, under the view taken by the supreme court, it becomes unnecessary to detail. The defendant insisted that if Steele promised to pay the award, he would not be legally liable to do so, and that, therefore, the defendant's agreement to submit and abide the award, was void, for want of consideration.

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The court charged the jury that the complainant, in order to entitle him to recover, must prove that the defendant and Steele made an agreement to submit the defendant's account to the arbitration of Edwards and Johnson, and that the defendant agreed to abide by their decision, and that Steele promised to pay the defendant whatever should be awarded him, and that, if the jury found that the defendant and Steele agreed to submit, and that it was agreed that the suit should be discontinued, or if they believed Cooper understood that Steele understood and supposed, from what was said, that the suit would be discontinued, then that Cooper was not justified in taking the defaults, and the plaintiff would be entitled to recover nominal damages; and, to determine this question, the jury were at liberty to consider all the evidence and acts and sayings of the parties, both before and after the time of the reference. This evidence, and the acts and sayings referred to, were detailed at great length in the bill of exceptions, but are omitted here for the reason above suggested. Verdict for the complainant. Exceptions by the defendant.

Cooper & Bartlett for the defendant.

1. The cause of action in this case originated in the alleged contract to submit, and its breach. If there was no contract, then there is no cause of complaint. The contract must be proved as laid; *Wright v. Gear*, 6 Vt. 151; *Vail v. Strong*, 10 Vt. 457; *Bristow v. Wright*, 2 Doug. 665.

2. The defendant's account, on which the suit was brought, was the just debt of the plaintiff individually, and of no one else. The promise to the defendant to submit, and abide the award, was not a binding obligation, because it was without consideration, Steele's promise to pay the award being void by the statute of frauds; Comp. Stat. 389; *Harrington v. Rich*, 6 Vt. 666; 2 Starkie's Ev. 544; *Matson v. Wharram*, 2 T. R. 80; *Anderson v. Davis*, 9 Vt. 136; Roberts on Frauds 210 to 225; Chitty's Contracts 202-204.

3. A submission of a cause pending, with a promise to abide the award, no security being given to pay the award, does not operate to discontinue the suit; but the suit may be prosecuted to final judgment; *Hayes v. Blanchard*, 4 Vt. 210; *Sutton v. Tyrrell*, 10 Vt. 87.

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J. H. Prentiss and Peck & Colby for the complainant.

Whether Steel's agreement to submit, and perform the award was, in law, binding, is not material. The question is, did Cooper, by his promise to submit and abide the award, and discontinue his suit, so far impose on the confidence of Steele and the plaintiff, that he thereby became enabled to, and did quiet them in relation to the suit, and take advantage thereof to deprive the plaintiff of his day in court, thus *fraudulently* procuring the judgment. The jury find that he did. For this, the judgment should be set aside. *Eddy v. Cochran*, 1 Aik. 359; *Hayes v. Blanchard*, 4 Vt. 210.

The opinion of the court was delivered by

REDFIELD, CH. J. The county court made this case finally turn upon a single point, whether the justice judgment, sought to be set aside, was taken when the present plaintiff supposed the suit would be discontinued, and when this defendant knew that was his expectation; or in other words, when the parties had agreed the suit should be discontinued.

If this point properly arises upon the declaration, it seems to us decisive of the case. For no principle is better settled, perhaps, than that a judgment entered up in a justice court, under such circumstances, may be vacated upon *audita querela*. It is regarded as obtained by mere fraud. And whether Steele's promise to submit was direct and absolute and original, or only collateral; or whether an action could have been maintained upon it, and if so, whether the whole debt could have been recovered by way of damages, is not important. If Cooper knew that Steele relied upon the submission as a discontinuance of the suit, it was none the less a fraud in him to take judgment upon his claim in violation of such confidence, because his reliance upon the arbitration was not a sufficient security for his debt. It was his folly to make such an arrangement. But having made it, he was no more at liberty to violate its true spirit because it was unequal. This inequality might have been good ground for inducing a jury not to find the fact of his consenting to have the suit discontinued. But it was surely no ground for excusing the violation of the confidence created by the transaction.

We might possibly infer that the jury made rather liberal pre-

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sumptions in regard to the understanding of the parties, or we might possibly think of some other suggestions which might properly enough have been made to the jury. But none of these are any sufficient ground for a new trial in the case upon exceptions. The only question is, whether the law was correctly stated to the jury. And we have said that it was.

II. Upon the point, whether the question submitted to the jury properly arises upon the declaration, it is alleged that the plaintiff believing the suit was not to be entered in court, did not attend to defend the same, and in consequence of such absence the defendant fraudulently procured judgment, by default. After verdict all presumptions are to be made in favor of the declaration, and of the construction adopted by the court and jury below. And especially is this to be done, where the particular objection now urged was not specifically stated at the trial. Under this view, we think the statement in the declaration is to be understood that the plaintiff absented himself from the trial under the expectation and confidence that the suit was to be discontinued, and that defendant, knowing that he acted upon that confidence, procured judgment to be entered by default. This was the very point submitted to the jury and being found by them is, we think, decisive of the case.

Judgment affirmed.

CYRELL A. SAWYER AND DARIUS HEALEY v. GEORGE WORTHINGTON, JR.

Joinder of plaintiffs.

The plaintiffs agreed to take jobs of work, and work together, each to be allowed for the time he worked on any particular job, and to hire, as near as possible, equal amounts of help, the profit of which was to be divided between them. The work in question was contracted for, by one of the plaintiffs, with reference to this agreement; and he informed the defendant that he was in partnership, or connected in business with the other plaintiff. The work charged for was done by the plaintiffs and their help, in pursuance of said agreement. *Held* that it was properly charged, and that a recovery thereof could be had in the name of the plaintiffs jointly.

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BOOK ACCOUNT. The plaintiffs' account was for work of themselves and others upon, and for materials furnished for a starch factory built by the defendant in the summer of 1853. The auditor reported that the charges were correct and reasonable, as to amount, and that the plaintiffs were entitled to recover therefor, subject to the opinion of the court, as to the right of the plaintiffs to recover in their joint names, upon the facts following.

The plaintiffs, who were both mill-wrights, agreed verbally, in the summer of 1853, to take jobs of work and work together on these terms; each was to be paid for the labor he might perform, and each was to hire, as near as possible, an equal amount of help, and divide the profit on the help hired; there was no agreement, and nothing was said between them of the division of losses, if any should occur, in any job they might take. After they had made this agreement, the defendant and a Mr. Little, since deceased, applied to the plaintiff Sawyer to construct the necessary gearing and machinery for a starch factory they were then building. Sawyer informed them that he was in partnership, or connected in business with the plaintiff Healey, and agreed with the defendant and Little to do their work for them. The work charged for was performed by the plaintiffs and their hired help, under their agreement, in reference to which Sawyer contracted with the defendant, as above stated. It did not appear that the plaintiffs ever took any other jobs than this under their said agreement; and it did appear that they did afterwards each take and perform separate jobs, in which the other had no interest.

The county court, June Term, 1855,—UNDERWOOD, J., presiding,—rendered judgment, on the report, for the plaintiffs.

Exceptions by the defendant.

J. H. Prentiss for the defendant.

There was no partnership between the plaintiffs. To constitute a partnership, as between the parties themselves, there must be a mutual agreement to share in the profit and loss of the business in which they are engaged. *Bowman et al. v. Bailey*, 10 Vt. 170. *Kellogg v. Griswold*, 12 Vt. 291. *Tobias v. Bin*, 21 Vt. 544. *Griffith et al. v. Buffum et al.* 22 Vt. 181.

Persons holding themselves out as partners, though in fact they

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are not, may be charged as such by one who deals with them as such; but the declaration of one of two persons that they are jointly interested, is not evidence to charge the other. *Cottrill v. Van Duzen*, 22 Vt. 511.

Had there been negligence or any other cause of action accruing to the defendant, growing out of this transaction, what fact is found in this case that would tend to fix any accountability on Healey to the present defendant?

J. L. Edwards for the plaintiffs.

Two or more persons may be holden as partners with respect to third persons, and joint participation in the profits will make them so, and not be partners as between themselves. *Kellogg v. Griswold*, 12 Vt. 291. *Stearns v. Haven et al.* 14 Vt. 540. And persons are to be treated as partners as respects third persons, if they so conduct and hold themselves out as such, whether their contract, as between themselves, would in fact make them so or not. See authorities above cited.

Although the plaintiffs were not partners, yet they were jointly and equally interested in the contract with the defendant, and are therefore competent to sustain a joint action. They were both to be benefited by the contract, and both acted as ostensible parties to it. *Bowman et als. v. Bailey*, 10 Vt. 170. *Matthews v. Felch et als.*, 25 Vt. 536. 2 Greenleaf on Ev. 476. *Dix v. Otis*, 5 Pick. 38.

The opinion of the court was delivered by

ISHAM, J. We can entertain no doubt that this suit was properly brought in the name of these plaintiffs. The auditor has found that a contract was made between them, in 1853, to take jobs of work together, and to divide the profits between them, and that this contract was made with particular reference to the work to be done for the defendant. Of this contract the defendants were informed when the plaintiffs agreed to do their work for them. This gave the plaintiffs a joint interest in the contract which will enable them to sustain this action, not only for their services, but for such materials as were furnished and used in fulfilling their contract. Though nothing was said in relation to the

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loss, if any should be sustained, yet the law will determine the matter by apportioning the same between them, in the same proportion that they were to share in the profits. The auditor having found that the account is just and reasonable, the plaintiffs are entitled to their judgment.

The judgment of the county court is affirmed.

JACOB FROST v. DANIEL PHILBROOK AND JAMES H. WOODBURY.

Review.

The plaintiff, in an action of ejectment against two defendants, recovered a verdict at the first trial against one only of them, who entered a review, and the plaintiff at the same time entered a review as to the other defendant. At the second trial a verdict was rendered in favor of both of the defendants. Held that the plaintiff was not then entitled to review the action as to the defendant against whom he obtained a verdict at the first trial.

EJECTMENT for a lot of land in Lowell. A trial was had in the county court at the June Term, 1850, when a verdict was returned for the defendant Philbrook, and against the defendant Woodbury. The plaintiff thereupon reviewed as to Philbrook, and Woodbury reviewed as to himself. A second trial was had at the June Term, 1855, to which time the cause had, from term to term, been continued, when a verdict was returned in favor of both of the defendants. The plaintiff claimed the right to review as to the defendant Woodbury, but the court,—UNDERWOOD, J. presiding,—denied the right and refused to grant the same; to which the plaintiff excepted.

Sumner & Willard for the plaintiff.

T. P. Redfield for the defendant.

The opinion of the court was delivered, at the circuit session in September, by

BENNETT, J. The only question in the case is, did the county

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court err in denying to the plaintiff a review? The action is ejectment; and upon the first trial the plaintiff had a verdict against Woodbury, and the defendant Philips had a verdict in his favor. The plaintiff entered his review, as against Philips, and the defendant Woodbury entered his review against the plaintiff. Upon the second trial the verdict was for both defendants, and the plaintiff proposed to enter his review against Woodbury, which was denied him. It was decided by this court before I was a member of it, in the case of *Sheplee et al. v. Page et al.* (not reported.) that in an action of tort one defendant is entitled to review his case in the county court, even though the judgment was final as to the other defendants; and this decision was acted upon in the case of *Paine et al. v. Tilden et al.*, 20 Vt. 563. This decision was made, no doubt, upon the principle that all torts committed by two or more are several, as well as joint; and that where a final judgment has been obtained against one defendant, and a review entered by the other, the effect is to save the proceedings, and to leave the judgment still in force as to the defendant against whom it was final. We at first thought that, under the decisions already made, the plaintiff was improperly denied his review, but upon more mature reflection we are inclined to think otherwise. The statute is, "that either party may once, and no more, review his cause." The plaintiff's action is ejectment, to recover the seizin and possession of a piece of land, an entire thing; and it is not improbable, though it does not appear from the case, that the two defendants stand in the relation of landlord and tenant, and that the title of one is subordinate to that of the other; or the two defendants may claim by a joint title; or their defense may have rested solely in a want of title in the plaintiff. The plaintiff's title is an entire thing to be tried, and so it may be said of the defendants' title, if they stand in the relation of landlord and tenant, or hold by a joint title; and in either of the cases we cannot think that the plaintiff should be permitted, after two verdicts the same way upon the title, further to litigate it, by attempting to sever the defendants by a review. The plaintiff saw fit to bring a joint action against the two defendants, and we have the right to suppose he rested his case, as to both, upon the same title; and it may be that, on the first trial, both defendants were not found to be in pos-

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session. We think then, in a case like this, it should be considered, that where the plaintiff, upon the first trial, had entered a review, though it was entered in form as to one defendant, (the other defendant entering a review for himself,) he had "*once reviewed his cause.*" Supposing this to be such a case, as we have a right to suppose it to have been, we cannot say there was error in the county court in denying to the plaintiff his second review, although it was simply claimed against Woodbury, who had a verdict against him on the first trial, and in form entered his review against the plaintiff. It is not necessary to say what would have been the result, if this had been a personal action founded upon a tort and simply for the recovery of damages. It is sufficient to say that in this particular case we find no error in denying the second review.

Judgment affirmed with costs.

WELLS COVERLY AND GUSTAVUS TUCKERMAN v. JOHN H. BRAYNARD ; CHARLES CARPENTER AND PORTER HINMAN Trustees.

Purchaser. Summoning of partners as trustees.

V One who purchases goods for his own benefit is liable for them, though he purchase them upon the credit of another, with his consent, and without disclosing his own interest in them.

Where the persons summoned as trustees are summoned only as partners, the effects or credits in the hands of one of them individually are not attached and cannot be holden.

BOOK ACCOUNT. On the 8th of May, 1851, the defendant entered into a written contract by which he agreed to peddle for his brother L. A. Braynard, who was to furnish a cart, horse and harness, and pay the defendant \$20 per month and his expenses; and on the 1st of May, 1852, a new contract in writing was made by which the defendant was to peddle for his brother during the following year, and receive, as his pay, one-half of the profits. He

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commenced peddling immediately after the date of the first contract, representing himself as the employee of L. A. Brainard, and continued until the fall after the date of the second contract, when, without any leave or permission, he took the goods out of the peddler's cart, and put them into a store in Charleston, and commenced and continued trading in the name of the said L. A. Braynard until the 1st of May, 1853, without the knowledge of the said L. A. Braynard.

About the 1st of May, 1853, the defendant started for Boston, and saw his brother, the said L. A. Braynard, at Thetford, where he told him he had been selling the goods at said Charleston, in a store, and asked him if he wished him to go on trading for him for a year to come. They agreed that the defendant should go on and sell the goods for the said L. A. Braynard, the defendant having one-half the profits for his services. Immediately thereafter the defendant went to Boston and purchased goods at different houses, all of which were charged to L. A. Braynard, and forwarded to the defendant at Charleston.

Several weeks after the goods reached Charleston, they were attached on a debt against L. A. Braynard which was contracted by the defendant, and thereupon he wrote to the said L. A. Braynard that the goods were attached, and he could not trade. The debt upon which the goods were attached was settled by Porter Hinman's note, and the goods were turned out to him by the defendant as security; there was more than enough to pay the debt then in suit and the defendant received the avails of the overplus.

Previous to 1851, the defendant had been in trade with his brother, J. Braynard, under the name and title of J. & J. H. Braynard, and had failed, and their creditors, since their failure, had been entirely unable to secure their debts against them. The debt in dispute was contracted at the time the defendant went to Boston, after seeing L. A. Braynard, about the 1st of May, 1853; and the goods purchased of the plaintiffs were charged on their books to L. A. Braynard.

At the time of the making of the contract, in May, 1852, L. A. Braynard claimed that the defendant owed him; and during the

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whole time the defendant was peddling and trading in the name of L. A. Braynard, he paid the said L. A. Braynard thirty dollars in shingles, and that was the only payment he made him after he commenced peddling for him.

The auditor reported that he was satisfied that the reason the defendant peddled and traded in the name of L. A. Braynard instead of his own was, if possible, to avoid costs being made him on debts due from J. & J. H. Braynard, and that he had the entire benefit of the goods bought of the plaintiffs.

Upon the foregoing facts and report, the county court, June Term, 1855,—UNDERWOOD, J., presiding,—rendered judgment for the defendant, to which the plaintiffs excepted.

The summons to the trustees in the plaintiffs' writ was as follows: "and you are further commanded to summon Charles Carpenter and Porter Hinman, partners in business under the firm "C. Carpenter & Co., both of Charleston in the county of Orleans, trustees of said John H. Braynard, to appear before said court, at the time and place aforesaid, and make disclosure, according to law, of the goods, chattels, rights or credits of the said John H. Braynard, which the said trustees may have in their hands or possession."

Each of the trustees disclosed, that the said firm of C. Carpenter & Co. had no effects or credits of the principal defendant in their hands or possession, but it appeared from the disclosure of Hinman, and the commissioner found that the said Hinman was, upon the morning of the day upon which the plaintiffs' writ was served, individually indebted to the principal defendant, but that he paid him that day, and before receiving the copy of the writ which had been left at his place of business for him, the amount of said indebtedness; that before that payment, he was informed by the plaintiffs' attorney of the issuing of the writ, and that he supposed it was served before that time; and that the money would not have been paid at the time it was but for the information given by the plaintiffs' attorney, and that the object of the payment at that time was to avoid being held as trustee. The commissioner found that the said Hinman was chargeable as trustee if the above notice from the plaintiffs' attorney was sufficient, taken in connec-

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tion with the other facts in the case, and if summoning the partners as such, was sufficient to hold the individual members of the firm.

The county court adjudged, *pro forma*, that the trustees were not, nor was either of them liable,—to which, also, the plaintiffs excepted.

J. H. Prentiss for the plaintiffs.

J. L. Edwards for the defendant and trustees.

The opinion of the court was delivered by

REDFIELD, CH. J. In regard to the principal action, if the defendant was the real purchaser of the goods, for his own benefit, he is undoubtedly liable, notwithstanding he purchased them on the credit of another, by the consent of such person, without disclosing the fact that he was himself the real party. And it seems to us, upon a fair construction of the auditor's report, this must be regarded as a case of that kind. The defendant seems to have been carrying on the business in the name of a brother, for his own benefit. The judgment is therefore reversed, and judgment rendered on the report for the plaintiffs against John H. Braynard.

In regard to the liability of the trustee, it seems to us he cannot be made chargeable upon the present attachment. It was decided by this court, (*McKenzie v. Ransom*, 22 Vt. 324,) that it was the writ which created the sequestration of property in the hands of the trustee, by delivering the trustee a copy. Of course, then, the attachment or sequestration of property would not go beyond the property described in the writ, as applied to the general law upon the subject of the liability of trustees. If different trustees are summoned generally, they are made liable for all their debts to the principal debtor, both joint and several; but not for partnership effects held by other partners, unless such effects are specifically described. *Pettes v. Spalding*, 21 Vt. 66.

The writ, in the present case, expressly requires the officer to summon the trustees, naming them, as partners in business under the firm of C. Carpenter & Co., to make disclosure of the goods, effects, &c., in their hands. This, upon any fair construction, can

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signify nothing more or less than the goods, effects and credits in their hands as such partners. Any other construction would be forced and unnatural, and we should not be prepared to adopt it, as it would certainly be liable to mislead in other cases, however it may have operated in this case. And however much the trustee Hinman may have labored to evade the attachment, he certainly cannot be made liable for effects in his hands not attached. And by the express terms of the writ, the attachment is limited to partnership effects. It is obvious the writ was not drawn with the remotest reference to any effects in the hands of either partner in his individual capacity. And although there may be some things in the case, which look like a shift of partnership effects, yet we do not revise in this court the finding of the facts in trustee cases. And the commissioner says, in express terms, that he only finds Hinman liable upon condition that summoning the trustees, in their partnership capacity, is sufficient to hold them individually, and Hinman swears expressly that he owed the \$500 individually. We think, therefore, unless we overrule the cases above cited, the judgment in favor of the trustees must be affirmed.

JOHN H. PRENTISS v. STEPHEN FOSTER, JR.

Partnership.

An order upon a firm for the credits which the drawer has in the hands of the firm or of any of its members, and an acceptance of it by one of the partners who has the special management and liquidation of the business and debts subsisting between the drawer and the firm, held to bind such partner individually.

ASSUMPSIT. The declaration was as follows: * * * "In a plea of the case for that heretofore, to wit, before the twenty-fifth day of February, A. D., 1848, certain persons, among whom was the defendant, were transacting business at Stanstead aforesaid, under the firm of Spalding, Foster & Company, and certain other

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persons, among whom was the defendant, were transacting business at Derby, in Orleans county, under the firm of Foster, Holmes & Company, and one Owen Brown, at Irasburgh aforesaid, on the twenty-fifth day of February, 1848, drew his order in writing under his hand of that date, directed to the said firms of Spalding, Foster & Company and Foster, Holmes & Company, therein and thereby requesting the said Spalding, Foster & Company, and the said Foster, Holmes & Company, for value received of the plaintiff by said Brown, to pay to the plaintiff or his order, on demand, so much as might be the avails or proceeds in the hands of said firms, or either of them or any member thereof, of a certain farm before then owned by the said Brown, after paying therefrom the demands due said firms from said Brown. And the plaintiff afterwards, on the same day, presented said order to said firms and to said Foster, who was, by said firms, entrusted with and appointed to the management and liquidation of the business and debts subsisting between said Brown and said firms, and either of them, for acceptance, who then accepted the same, whereby he became liable, and in consideration thereof, undertook and promised the plaintiff to pay him the same sum on demand. And the plaintiff avers that a large sum, as the avails or proceeds of said farm, was in the hands of said Foster after paying the lawful demands due from said Brown to said firms, to wit, the sum of one hundred and fifty dollars. Yet though often requested, the defendant has neglected and refused and still neglects and refuses to pay the sum due in said order, or any part thereof.

“Also, in a further plea of the case for that, heretofore, to wit, before the twenty-fifth day of February, 1848, certain persons were doing business in Stanstead, aforesaid, under the firm of Spalding, Foster and Company, and certain other persons, among whom was the defendant, were doing business at Derby, in Orleans county, under the name and firm of Foster, Holmes and Company; and one Owen Brown of Irasburgh, aforesaid, on the 25th day of February, 1848, drew his order in writing under his hand of that date, directed to the said firms of Spalding, Foster and Company, and Foster, Holmes and Company therein and thereby requesting them, the said Spalding, Foster and Company, and the said Foster, Holmes and Company, for value received of the plaintiff by the

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said Brown, to pay to the plaintiff, or his order, so much as might then or thereafter be due to said Brown as and for the avails and proceeds of a certain farm, before then owned by said Brown, over and above the debts due from said Brown to said Spalding, Foster and Company, and said Foster, Holmes and Company. And the plaintiff afterwards, on the same day of February, 1848, at Stanstead, aforesaid, to wit, at Irasburgh, aforesaid, presented said order to said Spalding, Foster and Company, and said Foster Holmes and Company, and said Foster, who was, by said firms, entrusted and appointed to the management and liquidation of the debts then and theretofore subsisting, and business then and theretofore, to be done by and between said Brown and said firms, and either of said firms, for acceptance, and said Foster then and there accepted the said order, whereby he became liable, and in consideration thereof undertook, and promised the plaintiff to pay him the sum so due as aforesaid, to said Brown over and above the debts due to said firms, as aforesaid, on demand. And the plaintiff avers that a large sum was due, and owing to said Brown from the defendant, as and for the avails and proceeds of said farm, over and above the sum of the debts due to said firms, to wit, the sum of one hundred and fifty dollars. Yet the defendant, though often requested has neglected and refused, and still neglects and refuses to pay the same, or any part thereof.

"Also, in a further plea of the case for that said Foster, at Stanstead, aforesaid, to wit, at Irasburgh, aforesaid, on the first day of June, 1853, being indebted to the plaintiff in the sum of one hundred and fifty dollars for so much money before that time had and received by the said Foster to the said plaintiff's use, in consideration thereof then and there promised the plaintiff to pay him the same sum on demand. Yet though often requested, the said Foster has never paid the same, but wholly neglects and refuses so to do. To the damage of the plaintiff, as he says, the sum of two hundred dollars, for the recovery of which, with just costs, the plaintiff brings suit."

To this declaration the defendant demurred. The county court, June Term, 1855,—UNDERWOOD, J., presiding,—overruled the demurrer and rendered judgment for the plaintiff. Exceptions by the defendant.

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J. L. Edwards for the defendant.

When a bill is improperly accepted, it cannot be recovered against the acceptor. *Saunders's Plea. and Ev.* p. 456, and authorities there cited.

No one can be liable as acceptor but the person to whom the bill is addressed. *Saunders's Plea. and Ev.* 464, and authorities there cited; *Polkill v. Walter*, 3 B. & Ad. 122, 114; *Stephen's Nisi Prius*, 824, 825; *Jackson v. Hudson*, 2 Camp. 447; *House v. Cazenore*, 16 East 391, 396, 397; *Williams v. German*, 7 B. & C. 468; 1 M. & R. 394, 403; *Bennetts v. Sewin*, 2 Lutw 896; *Bailey on Bills* 178; *Story on Bills*, Sec. 254, 255.

The acceptance by the defendant was a collateral undertaking, and he must be so declared against if liable at all. See *Oliver's Precedents* 220 for form of declaration *v. acceptor for honor*, 1 Went. 315.

T. P. Redfield for the plaintiff.

It is quite certain that the plaintiff cannot sustain an action against either of the firms, for the defendant accepted the order, and made the promise in his own name; *Luther v. Burnett*, 1 Aik. 197.

The order operated as an assignment of the fund, and a promise by the defendant holding the fund is of legal validity; *Williams, Err. v. Fullerton*, 20 Vt. 346; *Blin v. Pierce*, 20 do 25.

It is quite certain that Brown could have maintained an action against the defendant for this balance which the defendant held in his own hands after satisfying all liens upon it.

And this court have repeatedly held that the assignment of a chose in action is a sufficient consideration for a promise of the debtor to make payment to the assignee; *Moore v. Wright* 1 Vt. 57; *Hodges v. Eastman*, 12 do. 358; *Bucklin v. Ward*, 7 do. 195.

The acceptance of a bill need not be averred to be in writing; *Step. N. P.* 821; *Chalie v. Belshem*, 4 M. & P. 275, 6 Bing. 529.

Acceptance of a bill may be made by the drawee of the bill, or some other person. The acceptor is considered the principal debtor; *Steph. N. P.* 123; *Philpot v. Briant*, 4 Bing. 420; *Fentana v. Poweck*, 5 Taunt. 192.

The opinion of the court was delivered by

REDFIELD CH. J. This is a demurrer to the declaration. The

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declaration states, in substance, that one Owen Brown having funds in the hands of one of two firms, of which the defendant was a member, drew an order upon the firms, directing them to pay over whatever they, or either member of said firms might have in their possession, to the plaintiff. And it is alleged that the plaintiff presented the order to these firms, and to the defendant, who had, by the firms, been entrusted with the liquidation of the business out of which the money was expected to arise, for acceptance, and the defendant then and there accepted the same, and thus became liable to pay, &c.

From the form in which this order was drawn, requiring the money in the hands of either member of both firms to be paid over, and that the defendant had the control and management of the business out of which the money was expected to come, and that the defendant accepted the order individually, we are to assume, we think, that he accepted the order, and thereby promised to pay the money, upon the consideration of having it in his personal possession and control. This would be a perfectly valid contract, and would enable the plaintiff to recover either upon the special counts or general count for money had and received.

Judgment affirmed.

CHARLES LELAND v. LABAN SPRAGUE.

Landlord and Tenant.

An agreement, by the tenant or occupant of a piece of land, that the owner of the land, or one who has a right to it superior to his, shall own and be entitled to the crops to be raised thereon, is valid, and will enable the landlord to maintain an action of trover for them against an attaching creditor of the tenant, or one who purchases them of him with notice of the landlord's right.

TROVER for two thousand bushels of potatoes. Plea, the general issue; trial by jury, December Term, 1855,—POLAND, J., presiding.

The plaintiff introduced evidence tending to prove that in 1849,

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one Arad Hitchcock was the owner of a lot of land in Westfield, and contracted to sell the same to one Lewis Sawyer for two hundred dollars; Sawyer paid Hitchcock fifty dollars, and executed his notes for one hundred and fifty dollars, and Hitchcock gave Sawyer a bond to convey the lot to him upon payment of said notes. Sawyer went into possession of the lot, and cleared or partially cleared about ten acres of land upon it. In April, 1853, one William Allen made a trade with Sawyer to purchase his interest in said land and contract, and pay him \$180.00, and clear him from the notes to Hitchcock. Allen being irresponsible, Sawyer desired him to procure some person to become responsible for the payment of said sum, and, accordingly, Allen and Sawyer called on the plaintiff to procure him to become responsible, at which time the trade was talked over, and the plaintiff agreed to enter into the arrangement hereinafter mentioned; and notes were executed to Sawyer for the amount to be paid to him, and a writing to pay the notes still due to Hitchcock, and these were signed by Allen, as principal, and the plaintiff, as surety. At the same time an assignment was made, by Sawyer, of his bond from Hitchcock, to the plaintiff, and at the same time the plaintiff gave Allen a writing that when Allen should pay all said notes given for the land, and all legal claims that the plaintiff might have against him, he would convey the land to him. It was also agreed, at the same time, that Allen was to go on and plant said ten acres with potatoes, and that the plaintiff should furnish the seed, and make such advances in money as would enable Allen to raise said crop of potatoes, and that, in the fall, Allen should draw them to the plaintiff's starch factory, and that the plaintiff should pay, or account for them the current price, and, after satisfying all advances made by the plaintiff in money and potatoes, the balance, if any, should be applied on the notes for the land, and that said potatoes should be the property of the plaintiff. The agreement was by parol wholly, except the assignment of the bond and the writing given by the plaintiff to Allen, as above stated.

On the same day of the trade, the plaintiff paid Sawyer one of the notes given to him for the sum of \$50.00. The plaintiff also furnished Allen with most of the seed to plant said ten acres with potatoes, and also advanced money, from time to time, to enable

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him to cultivate them, to about the sum of two hundred dollars. Allen went on and planted said ten acres with potatoes, and cultivated the same; and also planted a small piece of corn, and a few oats, on the same lot. It did not appear that the plaintiff exercised any control over the management of said place by Allen, or that he directed at all, as to the manner of carrying the same on, but that Allen carried on the same as he pleased, as ostensible owner.

On the 24th day of September, 1853, Allen sold his interest in said land, and gave a bill of sale of the potatoes growing on said land to the defendant and one Dana, and also an assignment of said writing from the plaintiff to him,—all for the sum of fifty dollars, which was paid by the defendant; and the defendant, on the next day, went on to said premises and dug and carried away all said potatoes.

The plaintiff's evidence tended to prove that when the defendant and Dana made the contract with Allen, they were informed by Allen of all the contracts, arrangements and dealings between him and the plaintiff, above detailed.

The defendant's counsel requested the court to charge that, conceding all the facts to be found which the plaintiff's evidence tended to prove, the plaintiff could not recover. But the court charged that, if they found the contract between the plaintiff and Allen to be as the plaintiff's evidence tended to prove, and, that it was understood and agreed between the plaintiff and Allen that said potatoes were to be the property of the plaintiff from the beginning, and that the plaintiff made the advances to Allen as he claimed, and that when the defendant and Dana made their contract with Allen they had notice of all these facts, then the plaintiff would be entitled to recover. To this charge and refusal to charge, the defendant excepted. The jury returned a verdict for the plaintiff.

T. P. Redfield for the defendant.

The case negates that Allen was the servant of the plaintiff. Nor can it be questioned that Allen had possession and dominion of the premises in his own right.

Does an *executory contract* to raise and deliver to the plaintiff potatoes, *in futuro*, at his starch factory, vest in him the title be-

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fore delivery? Was Allen a *tort feasor* in using a portion of the potatoes in his own household? Had the crop failed, or had the potatoes been destroyed after they were dug, whose loss was it? Had a creditor attached them, could the plaintiff question his right? *Hurd v. Darling*, 16 Vt. 381; *Loomis v. Lincoln*, 24 do. 153.

This contract was executory, and vested no property in the potatoes until the delivery; *Brainard et al. v. Burton et al.*, 5 Vt. 97.

Peck & Colby for the plaintiff.

The case shows title in the plaintiff, and conversion by defendant, and, in principle, cannot be distinguished from *Smith v. Atkins*, 18 Vt. 465.

The opinion of the court was delivered by

REDFIELD, CH. J. The facts in this case show that as between Allen and the plaintiff the superior title to the land was in the plaintiff, and, as to this contract, Allen agreed, virtually, to raise the potatoes for the plaintiff, and that, from the first to the last, the title should be in the plaintiff. This contract was *bona fide*, and upon sufficient consideration; and the contract, under which the defendant claims title, was made with a full knowledge of the plaintiff's contract with Allen. It is then resolved into a mere question whether, under the state of facts, we can regard the title in the potatoes as in the plaintiff. The case is no doubt pretty near the line, and might without much violence be decided either way. According to the decisions of many of the American states, it would not be regarded as vesting any title in the plaintiff, which would be exempt from attachment by the creditors of Allen. But by our decisions, if the land is to be regarded as the plaintiff's, a contract for the growing crop to be his property is valid, even as against attaching creditors of the tenant. *Smith v. Atkins*, 18 Vt. We think the principle of this case must control the present.

Judgment affirmed.

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OTIS THOMPSON v. ALEXANDER KILBORNE.

Attorney and client. Confidential communications. Evidence.

A conversation with a lawyer, in reference to matters about which it was probable there would be litigation, but in which there was no retainer of the lawyer, nor anything showing that his advice was sought to regulate the future conduct of the other party in relation thereto, is not privileged from disclosure as a confidential communication between client and counsel.

The prevailing practice of the legal profession in this state, in giving opinions and advice upon legal subjects, without particular study and examination in reference thereto and corresponding pay or a distinct retainer, commented on and condemned.

Where to a declaration for the breach of a contract in not furnishing a proper and suitable kiln and dry-house, in which to secure certain hops, the defendant plead that he did prepare a suitable kiln and dry-house, ready for use when it was required, and according to the true intent and meaning of the contract, and to the full satisfaction of the plaintiff; evidence that the plaintiff consented that a new kiln and dry-house need not be built, but that one of his own might be, and that it accordingly was used, and the plaintiff paid for the use of it, is admissible, and has a tendency to support the issue presented by the defendant's plea.

COVENANT for the alleged breach by the defendant of his contract under seal, dated May 8th, 1844, agreeing, among other things, to furnish for the use of the plaintiff, for a hop-yard, for the period of nine years thereafter, five acres of the defendant's land, in Stanstead, and to prepare the necessary kiln, dry-house &c., in said yard, for the purpose of preparing the hops raised on said five acres for market,—the plaintiff by said contract agreeing to cultivate, raise and prepare the hops for market, and deliver one-half of them to the defendant: the breaches complained of being the refusal of the defendant to allow the plaintiff to occupy said five acres as a hop-yard after the fall of 1847, and the neglect of the defendant to prepare the necessary kiln, dry-house &c. in 1846. The defendant filed several special pleas, averring performance on his part, and non-performance by the plaintiff of his part of the contract. The allegations, both in the declaration and plea, and the terms of the contract, which the supreme court were called upon particularly to consider, are sufficiently set forth in their opinion, and in the argument of the defendant's counsel. The cause was tried in the county court, by a jury, at the December Term, 1855,—POLAND, J., presiding,—when a verdict was returned for the defendant.

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The only exception reserved by the plaintiff, upon that branch of the case which related to the alleged refusal of the defendant to permit the plaintiff to occupy the yard after the fall of 1847, was in reference to the admissibility of a part of the deposition of Elbridge D. Johnson, formerly of Derby, but now residing in Peoria, Illinois, offered by the defendant, which the plaintiff claimed related to a communication made by him to the said Johnson, as his counsel; the part of the deposition objected to, and that part in reference to the deponent's understanding of the relation in which he stood to the plaintiff, being as follows.

"The said Thompson came to me at my office, and had considerable chat about his contract with the said Kilborne. Whether the conversation was professional, or semi-professional, or neither, I am at a loss to determine, but I will state the circumstances, and leave the matter to be determined by higher authority. Thompson introduced the conversation by inquiring about his contract with Kilborne for carrying on the hop-yard. I am unable to state its exact purport, but am able to state the substance. He inquired if he could not make use of something which had occurred between him and Kilborne to avoid the effect of his contract to carry on the yard. I am unable to state whether it was something Kilborne had said or done in the matter, and am unable to say what reply I gave him, but he then said he should not carry on the yard again, and he thought the matter he stated would protect him in so doing, and he inquired of me if I did not think so.*

"The said Thompson intended to draw from me a legal opinion, I have no doubt, and that he did not expect or intend to pay anything for it, I have as little doubt; that I stated to him what was the law applicable to the case stated, is probable, but that I did not expect to receive any compensation for counsel, or intend to charge anything, is quite certain. I should state, perhaps, that Mr. Thompson was, when I knew him, a man somewhat given to legal reflections, and was supposed to have a slight taste for litigation, and was seldom without a controversy on hand, or one in prospect; and we were for many years neighbors and on friendly terms, and I dare say we have had some hundred just such legal conversations as the one above detailed, about his numerous controversies,

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which were all equally fruitless of fees, except when he got into a suit, when he usually employed me as counsel, and paid me, not what I charged for my services, but what we agreed upon whenever we got through with the not over agreeable process of a settlement of our accounts. It is possible, also, that the freedom with which I was accustomed to converse with him on legal subjects, and without charge, may have led him into the habit of getting his law for nothing from me, at this and other times ; at all events, it is quite as much my fault as his that I am not able to decide whether the conversation in question was a privileged communication or not. I am unable to say whether he understood our conversation as a consultation, or just a chat to fortify a determination he had already taken about the business. I may say that a different locality has taught me a much more sensible practice in such matters, and further deponent saith not."

The court allowed the deposition to the point * above designated to be read to the jury, to which the plaintiff excepted.

In reference to the alleged breach in not erecting a hop-house &c., the plaintiff's testimony tended to prove, that in the season of 1845, he advised the defendant not to build a hop-house in the yard that year, as the crop looked so unpromising that he considered it doubtful whether the land would be found suitable for growing hops, but that in 1846 he called upon the defendant to erect a hop-house for the use of said yard, and that the quantity of hops grown that year was such as to make it necessary, but that the defendant neglected to build one that year, whereby the plaintiff was obliged to have the hops taken to the plaintiff's hop-house in Derby, and cured there, whereby the hops were injured, and and the plaintiff subjected to expense and difficulty in getting them back into Stanstead.

The defendant then gave evidence tending to prove that the plaintiff advised him not to erect a hop-house, in 1846, for the same reason as in 1845, and assented that one should not be built that year, and that an agreement was made that the hops should be carried by the defendant from the yard to the plaintiff's hop-house in Derby, and cured there ; that they were so carried, and that he paid the plaintiff for the use of his hop-house

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for that year, and it was conceded by the plaintiff that the hops were drawn by the defendant, and payment made for the use of the hop-house, as the defendant claimed.

The plaintiff's counsel claimed, and requested the court to charge the jury, that if they found that such a contract was made between the plaintiff and the defendant in 1846, whereby the plaintiff consented that said hop-house should not be erected that year, still that could not be made available as a defense to the plaintiff's claim, because such defense was not admissible under the defendant's pleas. But the court declined so to charge, but charged that if they found that the plaintiff consented that said hop-house should not be built in 1846, it was an answer to the plaintiff's claim in that respect. To the refusal to charge as requested and to the charge as given the plaintiff excepted.

Cooper & Bartlett for the plaintiff.

The interview between Thompson and Johnson was evidently professional.

That they had an interview Johnson is sure, but what was said he cannot tell, further than he says the result sought was apparent, and he is able to tell what it was, but cannot repeat a word said by Thompson.

This deposition should be excluded, because it was a confidential communication between attorney and client.

The conversation was something besides a casual one, and because Johnson did not charge, it does not make it any the less confidential. That it was an interview between these parties when professional advice was sought, is certain, and it was so understood by both. That should be confidential, and is so. 2 Starkie on Ev. 375.

The defendant, having plead a performance of his covenant to build a hop-house, was not entitled, under that plea, to show an excuse for non-performance. Such excuse should have been plead.

J. H. Prentiss and Peck & Colby for the defendant.

I. To characterize the communication testified to by Johnson as a privileged one, there must have been, at the time, a retainer, or at least an action threatened, or a preparation for a suit, or some

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act or avowal by the party to indicate the relation which he understood to subsist between himself and the attorney; *Dixon v. Parmelee*, 2 Vt. 188; *Wetherbee et al. v. Ezekiel*, 25 Vt. 47.

The authorities are that a general retainer is not sufficient to protect communications had on a subject which afterwards gives rise to a suit; 2 Stark. Ev. 230-231. The rule does not extend to communications made to an attorney if he was not employed as such, nor prohibit a disclosure of privileged communications by a third person who accidentally overhears the conversation, for it is owing to the negligence of the client himself; 2 Stark. Ev. 229; 4 T. R. 753.

The same reason should apply to this case. There being no action pending when the conversation was had, none threatened, no retainer, if the plaintiff meant or desired to repress a disclosure it is his negligence and fault that he did not, *at the time*, guard it by some injunction, or, at least, an intimation of confidence.

2. The second count in the declaration sets forth that the defendant covenanted "to furnish the necessary kiln, dry-house, press and storage for the purpose of preparing said hops for market," and the averment of breach is, that the defendant "did not furnish a suitable and proper dry-house, kiln, &c., in which to secure the hops raised on said hop-yard," &c. The answer of the defendant, in his second plea, is, in the language of the contract, that he "did prepare and have ready for the use of said hop-yard, convenient thereto, a suitable and convenient kiln or dry-house, and press, for the drying and pressing of such hops as might be raised on said hop-yard; and the said dry-house and press were, in every particular, prepared ready for use when the same was required for the purposes aforesaid." And the defendant, in his fourth plea, says that he did "furnish a suitable and proper dry-house," &c., "in which to secure the hops raised upon said hop-yard, according to the true intent and meaning of the said writing obligatory, and to the full satisfaction of the said plaintiff." All that can be demanded of the defendant, under the pleadings, is, to show that the house was prepared and ready for use when it was required for the purposes contemplated in the contract. The agreement and concurrent admission of the parties should be the best and conclusive evidence that it was not required in 1845. These were treated as such evidence

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by the plaintiff, in relation to that year. The jury found that a similar agreement, and a like concurrent admission, was made by the parties in 1846, concerning the house for that year.

The proof is that the defendant did provide a suitable dry-house, &c., in 1846, viz., the one owned by the plaintiff. The contract does not require, nor do the pleadings claim, that he was bound to *build* a dry-house, at any time, or under any circumstances, or that a dry-house was required to be on the defendant's land, or that the plaintiff's house, which was used in 1846, was not convenient to the defendant's hop-field.

The opinion of the court was delivered by

REDFIELD, CH. J. I. The first question made in the present case is, whether the plaintiff's communication to Johnson was under the confidence of the relation of counsel and client. It seems to us not to be of that character. There was no retainer, and nothing to show that the plaintiff sought the advice with any view to regulate his future conduct, in regard to a pending or expected litigation. And, had any retainer been charged, there is every reason to believe the plaintiff could justly have resisted the claim, upon the facts stated by Johnson. And, had Johnson, the next hour, received an application for counsel, and retainer, upon the other side, no one can question his being at full liberty to engage.

This anomalous relation testified to in the deposition, and which seems so much to puzzle Johnson, and which he so justly deprecates, certainly grows out of a too common facility, upon the part of the profession, in this state, to undervalue their professional and official character, as sworn officers of the highest judicial tribunal in the state. The practice of giving advice, upon legal subjects, without study and examination, and without corresponding pay, and a distinct retainer, is certainly a vicious one. The practice of the profession of giving street advice misleads the general opinion in regard to the value and dependence upon such advice. It would no doubt be better for the profession, and their clients both, if all professional advice, in regard to the prosecution and defense of claims, were given in writing, as it is in many places, and both parties are thereby put under the proper responsibility in regard to it, the one to pay for it, and the other to make it hold good, or to

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show, at least, that it was not notoriously bad. But, at all events, we cannot regard a conversation of this loose and indefinite character as entitled to the protection of professional confidence.

II. In regard to the question, whether the evidence, on the part of the defendant, tended to support the issue, we have had more doubt. But it is obvious the defendant would not only be entitled to give evidence coming fairly within the terms of the issue, as closed upon the record, but also such testimony as came within the construction of the issue which the plaintiff had induced the county court to adopt.

The declaration upon this part of the case is, that the defendant covenanted to "furnish the necessary kiln, dry-house, &c., for the purpose of preparing the hops for the market." And the breach assigned is, that he "did not furnish a proper and suitable dry-house, kiln, &c., in which to secure the hops."

The plea to this part of the declaration is, that the defendant "did prepare"—"a suitable and convenient kiln and dry-house, and that it was prepared and ready for use," when "required for the purpose" of securing the crop, &c. 2. That he did prepare, &c., "according to the true intent and meaning of the said contract, and to the full satisfaction of the plaintiff."

The words of the contract are, "to prepare a suitable and convenient kiln or dry-house, to be prepared and ready for use, when the same shall be required."

The substance of the evidence offered and received upon the trial, and which it is claimed did not come within the issue, was, that the plaintiff, in 1846, directed the defendant not to build the dry-house that season, and consented to have his own dry-house used for that purpose, and that the defendant drew the hops to the plaintiff's dry-house, and paid him for the use of it, and the plaintiff made no objection, but assented fully to this arrangement.

This seems to us to meet the issue upon both pleas. It is furnishing the dry-house as soon as required for the purposes of the contract, and also to the satisfaction of the plaintiff, either of which would be sufficient.

If this were a plea of performance generally, and the proof of a dispensation with performance, it might merit a different consideration. The plea is only of a qualified performance, or perform-

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ance to the plaintiff's acceptance, and the proof is that very thing. If the dry-house had never been built, but the plaintiff had consented to have the kiln drying done at his own kiln, and received pay for the use of his kiln, and made no objection, it would be furnishing a kiln to his satisfaction.

Judgment affirmed.

HENRY RICHARDSON v. MEDAD HITCHCOCK.

Evidence. Intervening damages in an action upon a recognizance for an appeal.

In an action upon the recognizance, entered into by a third person for the appeal of a defendant from the judgment of a justice against him, the fact that such defendant, about the time of his appeal, gave in his list for property to a certain amount, is admissible as tending to show that he then had that amount of property.

The opinion of a witness in reference to the solvency of a person may be given in connection with the facts on which such opinion is grounded.

For the purpose of showing the insolvency of the defendant before the rendition of a final judgment against him, it may be shown that soon thereafter he was admitted to, and took the poor debtor's oath, before the jail commissioners, upon an execution in favor of a third person.

This may be shown by parol, the jail commissioners not being regarded as a court of record; and, for the mere purpose of showing the defendant's insolvency, it is immaterial whether a certificate, properly signed, was left with the jailor or not.

If a defendant, whose body is liable to be taken on execution, has, at the time of the rendition of a justice's judgment against him from which he appeals, property which would prevent him from taking the poor debtor's oath so that the plaintiff might, by an imprisonment of the defendant's body, obtain payment of his debt, and, between that time and the rendition of a final judgment on the appeal, he so disposes of the property that he is then enabled to swear out, the plaintiff would be entitled to recover, in an action on the recognizance for the appeal, the damages thus sustained in being deprived of the opportunity of so collecting the debt, although the property which the defendant owned at the time of the appeal was without, and beyond the reach of the process of this state.

SCIRE FACIAS upon a recognizance for an appeal, by one Jacob Stebbins, from a judgment recovered before a justice in favor of the plaintiff. The defendant pleaded a tender of the additional

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costs, and that there were no intervening damages beyond ; trial by jury, December Term, 1855,—POLAND, J., presiding.

It appeared that the plaintiff recovered a judgment before a justice of the peace, against the said Stebbins, for \$52.14 damages, and \$2.14 costs, on the 13th of May, 1850, from which judgment the said Stebbins appealed ; and that the plaintiff recovered a judgment against him in the county court at the December Term, 1850, for \$54.18 damages, and \$14.03 costs. It also appeared that the writ issued against the body of Stebbins, and that he was arrested thereon and gave bail.

The plaintiff gave evidence tending to prove, that at the taking of said appeal, the said Stebbins possessed real and personal estate in the state of Massachusetts ; and, to prove that, offered the deposition of John R. Smith to which the defendant objected, claiming that the subject matter of it was not legal evidence. That portion of said deposition, containing statements of the said Stebbins to the witness, marked in brackets, was excluded ; the residue was admitted, to which the defendant excepted. The plaintiff also gave in evidence an execution in favor of *Patty Hitchcock v. Jacob Stebbins*, dated January 6th, 1851, on a judgment recovered at the December Term, 1850, of Orleans county court, for \$62.00 damages, and \$13.99 costs of suit, with the officer's return thereon, that on the 5th of February, 1851, said Stebbins was duly committed thereon to the jail in Irasburgh. The plaintiff thereupon offered to prove that said Stebbins was, in March, 1851, admitted to the poor debtor's oath upon said execution, and discharged from jail thereon, and offered George Worthington, who was then one of the jail commissioners of Orleans county, to prove that fact. The defendant objected that this must be shown by the certificate left with the jailor. The plaintiff thereupon produced the certificate, which the defendant objected to because it was signed by only one of the commissioners, and also because it was not shown that a regular petition and citation had issued ; but the court overruled all said objections, and allowed the certificate to be read. Worthington was also admitted as a witness, and testified that said Stebbins was duly admitted to the poor debtor's oath ; that the creditor was notified and appeared, &c. The defendant excepted to the admission of Worthington as a witness, and to said certificate.

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The plaintiff introduced his execution, issued upon his final judgment against Stebbins, dated January 6th, 1851, which was returned *nulla bona*, February 10th, 1851.

The court, among other things, charged the jury that if they found that at the time the appeal was taken by Stebbins in the plaintiff's case, he was the owner of property so that he could not have taken the poor debtors oath, although it might be property without this state so that it could not be attached by any legal process in this state; and that if the plaintiff had his execution then, and by committing Stebbins to jail thereon, he could have thereby enforced payment of his debt; and that the condition of Stebbins' property had become so changed, at the time when the plaintiff recovered final judgment and obtained execution, that he could properly and legally take the poor debtor's oath, and that the plaintiff had no means of enforcing payment of his debt, then the plaintiff ought to have a verdict; that the real question for the jury to determine, was whether the plaintiff lost his debt, or any part of it, by the delay occasioned by said appeal and the change in Stebbins' property and circumstances during the same period; if he had sustained such loss by the delay he should have a verdict to that extent, but if he had not, the verdict should be for the defendant. To so much of the charge as is detailed, the defendant excepted. Verdict for the plaintiff.

The deposition of John R. Smith, above referred to, was as follows.

"I first became acquainted with Jacob Stebbins, late of said Sunderland, now deceased, in the Spring of 1835, and was frequently in intercourse with him thereafter, as long as he lived; he worked for me more or less, several years, during his residence in this town. In the year 1850 I was one of the board of assessors for the said town of Sunderland, and the said Jacob Stebbins gave in his list for real estate, which said board set in the valuation at the sum of four hundred dollars, and personal property, the sum of two hundred dollars, being for money at interest; and he was taxed for said sums in the town, county, and highway taxes for said year 1850. The lists are taken in this state for the first of May, annually, and I have no doubt but that he was worth as much as the amount of said sums, being six hundred dollars on the first day of

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May, 1850. I think so because he was averse to paying more than he was legally required to at any time, [and also because he had, a year or two previous to the year 1850, told me that he was worth somewhere in the neighborhood of a thousand dollars.”]

Cooper & Bartlett and Peck & Colby for the defendant.

The proceedings upon the execution, *Patty Hitchcock v. Stebbins*, were *into alios*; and this defendant, having no notice, is not affected by the declaration of Stebbins, or the judgment thereon of the jail commissioners. It amounts to this. Stebbins stated, on oath in that case, that he was poor, and commissioners let him out of jail; clearly if Stebbins had been committed to jail on the execution in favor of this plaintiff, the certificate of the commissioners in the other case would not be admissible to show his poverty as against this plaintiff. How, then, should it be admitted against the defendant as any proof of any fact?

An examination of a pauper, *ex parte*, though taken upon oath, is not admissible evidence against the appellant parish; *Rex v. Ferry Frystone*, 2 East. 54; *Rex v. Nunham Co.* 1 East 373; *Rex v. Eriswell*, 3 T. R. 721; 2d Stark. Ev. 386.

The certificate of discharge, signed by one only of the jail commissioners, is void. The statute requires two to act for a quorum; Comp. Stat. Chap. 112 Sec. 45.

It cannot be said that the examination may have been regular, and before a full board; for in these cases the certificate is the judgment, and a plea of judgment and discharge without alleging and setting out a certificate, was held bad; *Staniford v. Barry, Brayt.* 200; *Raymond v. Southerland*, 3 Vt. 505. The case shows, then, simply an escape of Stebbins in the case of *Patty Hitchcock v. Stebbins*.

The parol evidence of a commissioner was not competent, for it was only hearsay. The certificate is the legal mode of proof. The certificate is conclusive of all facts apparent thereon; *Allen v. Hall*, 8 Vt. 34.

In *Bancroft v. French & al*, Washington supreme court, 1851, an action was held not to lie against jail commissioners for giving an informal and void certificate for the reason that it was a judicial act.

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J. H. Prentiss and *T. P. Redfield* for the plaintiff.

The matter in Smith's deposition was pertinent, and the deposition admissible. The declaration of Stebbins, which the deposition narrates, was made when he could anticipate no advantage therefrom, and was against his interest when it was made. Declarations by tenants are admissible evidence, after their death, to show that a certain piece of land is parcel of the estate which they occupied, and proof that they exercised acts of ownership on it, not resisted by contrary evidence, is decisive; *Davis v. Pierce*, 2 Term 53. See also *Roe v. Rowlings*, 7 East 278; *Higham v. Ridgeway*, 10 East 109; *Doe v. Robson*, 15 East. 32; 1 Stark. Ev. 45, 46.

The testimony was not offered to prove an assessment. One may be assessed for that which he does not own. It was offered to prove an admission, a claim of title, which, being against the interest of Stebbins in the particular instance, and touching a matter entirely within his knowledge, is better evidence than a mere assessment. It was his declaration accompanied by his act of giving in his list; *Elkins v. Hamilton*, 20 Vt. 627.

Mr. Worthington was properly admitted as a witness. So was the certificate of the jail commissioners. The evidence was offered merely to prove the poverty of the debtor. It was not essential to the plaintiff's right of recovery in this action that Stebbins should have been discharged from jail, nor that he should have obtained the commissioner's certificate.

The evidence was offered to prove that on a certain day, before a lawfully constituted court, authorized to administer oaths, and appointed for the purpose of determining the fact, though not a court of record, Stebbins was examined on oath, and the fact established that he had no estate other than such as was exempt from attachment. The fact that such proceedings were had, and the evidence offered to prove them were admissible. It was like proof by one of a board of auditors, or a juror, that a certain isolated fact within their province, to determine, was found by the board or panel.

The certificate was admissible to prove that Stebbins had been admitted to the poor debtor's oath, and the conclusion follows, as matter of law, that he ought to be discharged.

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The charge of the court was but a repetition of the law as settled by the supreme court; *Mc Gregor v. Balch*, 17 Vt. 562.

The opinion of the court was delivered by

BENNETT, J. The defense of the action is put upon the ground of a tender of the additional costs occasioned by the appeal, and a denial of there being any *intervening damages*.

We think the deposition of John R. Smith was admissible, so far as it was received by the county court. That part of it included in brackets, and going to show the declaration of Jacob Stebbins to the deponent, in regard to the amount of his property, was excluded by the court below. But the fact that Stebbins gave in his list, for 1850, for property to the amount of some six hundred dollars, is a distinct fact, and has some tendency to prove that he had property to that amount, and this act of the principal is equally evidence against the surety. The opinion of the deponent that the principal, in May, 1850, was worth six hundred dollars, we think was well enough admitted. The deponent had been acquainted with the principal from the spring of 1835, and he had worked for the deponent more or less, several years, during his residence in the town; and, in 1850, the deponent was one of the assessors of the town, and the principal gave in his list for real and personal estate for that year, to the amount of six hundred dollars. The deponent gave the grounds of his opinion.

In *Hard v. Brown*, 18 Vt. 87, it was held that a witness might be allowed to express his opinion as to the solvency of an individual, as derived from a personal acquaintance with him, and from his reputation, in this respect, in the community.

We think it was competent, for the purpose of showing insolvency in the principal before final judgment was obtained against him, to show that in March, 1851, he swore out of jail on the execution in favor of Patty Hitchcock, and we see no objection to the medium of proof. It is evidence of insolvency, as against the principal; and, as the relation of principal and surety existed between Stebbins and the defendant, it is evidence against the latter.

The proceedings of the jail commissioners may be proved by parol. They have never, with us, been regarded as a court of

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record. They testified that Stebbins had, by them, been admitted to the poor debtor's oath, and this was all that was important to the case. It was of no particular importance, in this case, whether a certificate was lodged with the jailor or not, and we see no objection to the admission of the certificate lodged with the jailor, as a part of the transaction, although signed by only one of the commissioners. If the sheriff had been sued for an escape, by the creditor in the execution, the case would have been quite different.

We see no objection to the principles of the charge, and it was fully warranted by the case of *McGregor v. Balch*, 17 Vt. 562.

Judgment affirmed with costs.

THE TOWN OF CRAFTSBURY v. REUBEN W. HILL AND JOHN
LOCK.

Arbitration.

The revocation of a submission is a breach of an agreement or condition in an arbitration bond to abide by and perform the award.

DEBT on an arbitration bond, executed by the defendants to the plaintiffs, the condition of which recited the submission of a suit pending in favor of the defendant Hill, against the plaintiffs, to certain referees named, and concluded as follows:

"Now, if the said Reuben W. Hill, his executors and administrators, on his and their part, shall and do, in and by all things, well and truly observe, perform and keep the award and determination which the said arbitrators shall make and publish of or in the premises, in writing, under their hands, on or before * * * * then this obligation is to be void, otherwise to be and remain in full force."

The declaration, after setting forth the execution and condition of the bond, alleged a breach or forfeiture of it as follows:

"Yet the said Hill, by his instrument in writing, sealed with his seal on the 12th day of October, A. D 1855, revoked the power

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of said arbitrators to make an award. * * *

"Now, the plaintiffs say that the said Hill hath not, in and by all things, well and truly observed, performed and kept the award and determination which the said arbitrators should make and publish of or in the premises, in writing, under their hands, on or before * * * as by the condition of his writing obligatory aforesaid he was bound to do, but by his revocation of his said agreement to submit the said matters in dispute to arbitration as aforesaid, hath occasioned the loss to the plaintiff of large sums of money expened in procuring counsel, securing the attendance of witnesses, and in preparing for the trial before the arbitrators, as aforesaid, to wit, the sum of one hundred dollars."

To this declaration the defendants demurred. The county court, December Term, 1855,—POLAND, J., presiding,—adjudged the declaration sufficient, to which the defendants excepted.

_____ for the defendants.

_____ for the plaintiffs.

The opinion of the court was delivered, at the circuit session in September, by

BENNETT, J. This is an action of debt upon a bond of submission to arbitration, and the condition is, "that said Hill, his executors, &c., *shall and do, in and by all things, well and truly observe, perform and keep the award and the determination which the arbitrators shall make.*" The breach of the condition set up in the declaration is a revocation of the submission, and the question raised on the demurrer, seems to be, whether that is a breach of the submission. We think this question is well settled by authority. See *Vynior's* case, 8 Coke 162, 3d resolution, and *Warberton v. Storer*, 4 B. & C. 103. By the revocation, Hill had deprived the arbitrators of the power to make an award, and consequently also himself of the power to *observe, perform and keep it*, and this, in legal effect, is a forfeiture of the bond, and a breach of the condition. The condition of this bond seems to have been drawn according to modern precedents.

Judgment of the county court affirmed.

Heirs of Holmes v. Admr. of Holmes.

CHAUNCY WILSON AND WILLIAM DOW, *apts. v.* JACOB BATES,
Administrator of HARRIET N. HOLMES.

Distribution of intestate feme covert's choses in action. Reducing of them to possession by her husband. Allowance to administrator for expenditures in unsuccessful lawsuits.

The choses in action of a *feme covert*, in this state, who dies intestate and without issue, which had not been reduced to possession by her husband, are to be distributed to her collateral heirs, to whom her real estate, if she had any, would descend;—and not to her husband.

The fact that such choses in action were all the property that the wife possessed, and that she, before the marriage, so informed her husband, and that he, at her desire, procured her wedding dress and other wedding preparations, and was at the whole expense of furnishing the house, and that, after the marriage, she handed the notes to her husband, who took them and kept them with his other papers, do not constitute a reducing of them to the possession of the husband, or give him any valid lien upon them.

An administrator should be allowed for his expenditures in a law-suit in which he was unsuccessful, if he acted in good faith, and with reasonable prudence;—and whether he did so or not, must ordinarily depend upon the facts in each particular case.

In the present case, the administrator allowed for such expenditures, it being found that he acted in good faith, and under the advice of suitable counsel, believing he had the right of the case.

APPEAL from an order of the probate court allowing the account of the appellee, as administrator, in which account was included the account of George R. Holmes, a former administrator; and decreeing the residue of the estate, remaining after the allowance of said account, to the said George R. Holmes.

Upon trial in the county court, December Term, 1855,—POLAND, J., presiding,—the following facts appeared.

The appellants were a brother and brother-in-law, and the said George R. Holmes was the husband of the intestate, Harriet N. Holmes, whose maiden name was Harriet N. Wilson. Prior to her marriage she held some notes against her brother, Chauncy Wilson, payable to herself, given for her share in her father's estate. These notes remained unpaid in the hands of her husband at the time of her decease. After her death, her brother and sister, (she having left no children,) applied to the probate court, in Orleans county, to appoint David M. Camp administrator, and opposed the appointment of Holmes, because he lived out of the state;

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—but the probate court appointed Holmes. He inventoried the above mentioned notes as the property of the estate, and, as administrator, commenced a suit upon them against said Wilson. While this suit was pending, the heirs applied to the probate court to remove him, as administrator, and the probate court did so. He appealed from this order of the probate court to the county court, when the order was affirmed; and he then carried the case to the supreme court, on exceptions, and the judgment of the county court was affirmed.

That portion of the administrator's account which was objected to was for the costs and expenses, and counsel fees of the said Holmes, in litigating said appeal from the probate court. The court found that Holmes, in all said proceedings, acted under the advice of suitable counsel, and in good faith, believing himself legally entitled to administration. Bates was appointed administrator, upon the removal of Holmes, and prosecuted the suit commenced against Wilson, on said notes, to final judgment, and collected the amount;—and, the money thus collected, was the whole estate of Mrs. Holmes in the hands of the administrator. It was proved by said Holmes, though objected to by the heirs, that before his marriage, the said Harriet N. informed him that her only means were these notes against her brother, who was not then ready to pay them; and that he, at her desire, procured her wedding dress, and other wedding preparations, and was at the whole expense of furnishing the house; and that, after their marriage, Mrs. Holmes handed the notes to her husband, and requested him to keep them, and he did keep them, with his other papers, till after her death, and until he was appointed administrator, as aforesaid, when he placed them in the hands of his attorney for collection. It was also proved that Mrs. Holmes was sick for some three months before her death, and that her husband was at a great deal of expense for nursing and medical attendance for her during that period.

Upon these facts the court adjudged that the decree of the probate court, allowing the administrator's account, be affirmed; but that the decree of the probate court ordering the residue of the estate in the hands of the administrator to be paid to the said George R. Holmes, be reversed, and that the same be decreed to

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be distributed among the legal heirs of Mrs. Holmes. To this decision, as to the allowance of the administrator's account, the appellants excepted;—and, as to the reversal of the residue of the decree of the probate court, the appellee excepted.

Cooper & Bartlett and *T. P. Redfield* for the appellee.

The husband is entitled to the choses in action of the wife on decease of the wife; 26 Vt. 336; Story on Promissory Notes 88; *Whitaker v. Whitaker*, 6 John. 116; 2 Kent's Com. 420; 1 Peere Williams 380–382; Comp. Stat. 365; Reeve's Dom. Rel. 22.

The husband will be deemed to have taken the choses in action by purchase, having made advances, at the wife's request, before marriage, and the notes passed into his hands in consideration thereof; see Reeve's D. R. p. 26.

The defendant's expenditures, as administrator, having been made in good faith, and by the advice of counsel, his account was properly allowed; *Woods, Admr. of Eame's Estate v. Creditors of Eame's Estate*, 4 Vt. 256.

Peck & Colby for the appellants.

Under our statute of distributions, the property of intestates, leaving no issue, or father, goes to the mother, brothers and sisters. Comp. Stat. chap. 55, § 1. Words denoting masculine gender extend to females. Comp. Stat. chap. 4, § 1. The statute undoubtedly applies to females intestate, as well as males, and leaves no room for doubt of the propriety of the decision of the court below.

The items of costs and expenses, counsel fees, &c., incurred by Holmes, after his removal from the office of administrator by the probate court, do not constitute a proper charge upon the estate. A large share of this expense accrued in consequence of an appeal taken by Holmes, from the decree of the probate court, removing him as administrator. The county court decided against him, and likewise the supreme court, and that, too, upon the ground that the decree was not the subject of error, but was within the final jurisdiction of the probate court. In this decree, Holmes should have acquiesced, but he appealed for his own benefit, all the while claiming to own the estate. His argument in the supreme court, shows this to have been his claim; *Holmes v. Est. of Holmes*, 26 Vt. 540.

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The suit was prosecuted by Holmes, without just cause; *Eames' Admr. v. Creditors*, 4 Vt. 258; Comp. Stat. chap. 53, § 14. The costs are not such as were paid out to the adverse party, the estate, as he has paid none, but the costs of his counsel, &c. The question cannot be settled in this form, as it only arises in the settlement of Holmes' account as administrator, not in settling the account of Bates, the present administrator; Comp. Stat. chap. 53, § 14.

The opinion of the court was delivered, at the circuit session in September, by

BENNETT, J. The widow, Harriet N. Holmes, in this case, died without issue, and, upon the settlement of her estate in the probate office, a balance was found due the estate, in the hands of the administrator, and that balance was decreed by the probate court to be paid to George R. Holmes, the surviving husband of the deceased wife; and, the first question is, who is entitled to that balance? Does it go to the surviving husband, or to the collateral heirs of the wife?

The statute, Comp. Stat. chap. 55, § 1, in relation to the descent of real estate, provides that, if the deceased person shall leave no issue, nor widow, nor father, his estate shall descend in equal proportions to his brothers and sisters, and to the legal representatives of any deceased brother and sister, and the mother, if living, shall have the same share. No question can arise but what this statute applies to a case where the deceased person was a female, as well as a male; and, indeed, our statute provides that every word importing the masculine gender only, shall be held to extend to females as well as males. The statute relating to the disposition of personal estate, provides that what shall remain for distribution shall be distributed to the same persons, and in the same proportions, as is prescribed for the descent and disposition of the real estate. In the present case, the property of the wife, at the time of her decease, consisted of *choses in action* which had not been reduced to possession by the husband, in the life-time of the wife; and, in such cases, the choses in action belong to her estate, and not to that of her husband, and go to her issue or kindred, after the payment of debts, and not to the husband. There is no ground to claim that the statute of the 29th of Charles II was ever in force in this state,

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which places husbands, who become administrators upon the property of the wife, in a different situation from other administrators. It is incompatible with our legislation on the subject; and our statute, like the statute of 22d Charles II, compels all administrators to distribute the estate of the intestate to the legal representatives of the wife. The husband, though administrator of the wife, cannot retain to himself what, by the statute of distribution, goes to the issue or collaterals of the wife. It cannot be claimed that the husband, in the life-time of the wife, reduced the notes to possession. All that the case finds is, that soon after the marriage the wife delivered the notes to the husband and requested him to keep them, and he did keep them, with his other papers, until after her death. The fact that she told him, before they were married, that those notes were all her means, and that he purchased for her a wedding dress, and made other preparations for the wedding, at her request, and purchased the furniture, cannot have the effect to constitute a reduction of the notes to possession, or to give the husband a valid *lien* upon the notes, though doubtless the wife contemplated the husband should have some benefit from the notes, if not the whole of them. We find from the case that the husband, in fact, inventoried those notes as the property of the estate, and commenced suits on them while he was administrator. We must, then, take the notes to be the choses in action of the wife at the time of her death; and, it was rightfully held, by the county court, that the balance of what remained of their avails, upon the settlement of the estate, should be decreed to the legal heirs of the wife.

A question is raised as to an item allowed the husband, in his administration account, for costs, expenses, and counsel fees, in litigating the appeal from the court of probate, (which vacated his letters of administration,) in the county and supreme courts. The county court found that Holmes, in all said proceedings, acted under the advice of *suitable counsel*, and in good faith, believing himself entitled to administration, and the county court allowed him that portion of his account. It is said in the case of the *Admr. of Eames v. The Creditors of said Estate*, 4 Vt. 256, that "an administrator will be allowed his account for expenditures in a law suit, in which he fails, when he acts in good faith, and with *reasonable prudence*, but he may press on a suit with so little prudence, and

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so little prospect of recovery, that he ought not to be allowed his costs." The test, then, seems to be, did the administrator act in *good faith*, and with *reasonable prudence* in incurring the expenses? and, these are questions of fact.

The county court having allowed the administrator his account, upon the ground that he acted in good faith, and under the advice of suitable counsel, believing he had the right of the case, or, in other words, having acted *reasonably*, this court cannot, as matter of law, say that the court erred in allowing that part of the account. The law cannot fix a rule for not allowing to an administrator expenditures in litigation, upon the ground that they were *unreasonable*. This must depend upon the facts in each particular case. In the case in 4 Vt., the question came up upon the report of the commissioner, made directly to the supreme court, and not on exceptions. We think, then, the judgment of the county court, in this particular, should be affirmed.

Judgment affirmed without costs, as both parties excepted.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF VERMONT,
FOR THE
COUNTY OF ESSEX,
AT THE
APRIL TERM;
AND AT THE
CIRCUIT SESSION, IN SEPTEMBER, 1856.

PRESENT,
HON. ISAAC F. REDFIELD, CHIEF JUDGE.
HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.
HON. MILO L. BENNETT, }

JAMES STEELE v. HERMAN TOWNE.

Statute of limitations. Statute of frauds. Bankruptcy.

A declaration of the defendant that, if he owed the plaintiff anything he was willing to pay him, *held* sufficient, upon the indebtedness being proved, to prevent the operation of the statute of limitations, although the defendant, at the same time, claimed that he did not owe the plaintiff anything, and that it was his impression that he had paid the demand in question; the claim, in connection with the impression, evincing no unwillingness to remain liable, if the fact of payment should be found against him.

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The defendant, at the request of S., carried certain papers to the plaintiff, and informed him that S. wished him to commence suits thereon. The plaintiff refused to do so unless the defendant would become responsible for certain advances of money which the plaintiff would be obliged to make, whereupon the defendant assured the plaintiff that S. was good for that, and, if not, that he (the defendant) was, and thereupon the plaintiff commenced the suits. *Held*, that the defendant's undertaking was collateral only, and, not being in writing, could not be enforced, though, in point of fact, S. was not responsible; it not appearing that the defendant had acted in bad faith.

A subsequent promise of the defendant to pay the plaintiff, for which there was no consideration, could not convert such collateral undertaking into an original one.

The fact that, after the accruing of an account in favor of the plaintiff, he went into bankruptcy, under the late U. S. bankrupt law, and that the account was not included in the schedule of claims annexed to the petition of the defendant for the benefit of that law, will constitute no bar, in favor of the debtor, against the prosecution and collection, by the plaintiff, of such account.

BOOK ACCOUNT. The plaintiff's account consisted of several charges for his services and expenditures as an attorney. The auditor reported that the services were performed as charged for in the first item of the account, and that they had never been paid for; but that the statute of limitations had run upon the charge, subject to the opinion of the court upon the following facts. The defendant had said on several occasions, since this action was commenced, and likewise so testified in the justice's court in which this suit was originally brought, that if he owed the plaintiff anything he was willing to pay him, but at the same time claimed that he did not owe him anything, and that it was his impression that he had paid said charge, but that he would not swear to it positively.

In regard to all the items of the account, from No. 2 to No. 23 inclusive, the auditor found and reported that the services were performed and the moneys advanced by the plaintiff as charged in his account, under the following circumstances, viz. In February, 1842, the defendant carried certain papers to the plaintiff, from one Arunah Spear, and told the plaintiff that said Spear wished him (the plaintiff) to bring two county court suits, in favor of said Spear, against the individuals mentioned in the items of the plaintiff's account. The plaintiff was not then acquainted with said Spear, and refused to bring said suits unless the defendant would become responsible to him for his advances of money in the same; the defendant assured the plaintiff that Spear was good for that, and, if not, that he (the defendant) was; and thereupon the

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plaintiff commenced said suits, and the same were continued from term to term, as specified in the plaintiff's account. The defendant did not agree to pay the plaintiff for his services in said suits, nor in any manner become liable to pay the advances made by him, except as above stated. Spear was not responsible as represented by the defendant, and never appeared in said suits, or gave any instruction in regard to the same, or recognized them in any manner whatever, subsequent to sending the papers to the plaintiff by the defendant, as above stated. The auditor decided that the representations and declarations of the defendant, as above set forth, did not constitute such an undertaking as would render the defendant liable to the plaintiff in this action, either for his professional services or for the advances made by the plaintiff, as charged in his account, and disallowed all of said items; but reported further in reference to them, that at the time of the service of the plaintiff's writ, in this action, the defendant told the plaintiff it was a debt of long standing, and he would pay it, but that it did not belong to him to pay,—that it was the business of another man, and he (the defendant) had got into the difficulty by carrying papers which belonged to another.

At the request of the defendant, the auditor further reported the following facts, viz.: During the years the plaintiff's charges purport to have been made, the plaintiff was doing but little professional business, and was accustomed to make his charges and keep his account for the same on slips of paper, and his account against the defendant was so made and kept, and never was entered upon any book. After a part of these charges were made, the plaintiff went into bankruptcy, and his books and credits were passed into the hands of R. C. Benton, assignee; no charges or accounts against the defendant appeared in said book and credits, nor was said account against the defendant included in the schedule annexed to the plaintiff's petition, to the district court, for the benefit of the bankrupt law; which schedule purported to contain an accurate inventory of the plaintiff's property, rights and credits of every kind and description.

The county court, May Term, 1854,—POLAND, J., presiding,—decided that the plaintiff was entitled to recover the amount of his charges for cash advanced in the suits of Arunah Spear, but was

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not entitled to recover any of his other charges. To this decision both parties excepted.

_____ for the plaintiffs.

_____ for the defendants.

The opinion of the court was delivered by

BENNETT, J. We think the first item in the plaintiff's account is not barred by the statute of limitations. The plaintiff declared, and so testified, that, "if he owed the plaintiff anything he was willing to pay him." The auditor has found that the services were rendered, as charged in the plaintiff's account, and that the same have never been paid. Though the admission is conditional in its terms, yet, when it is proved that the defendant owes the plaintiff, it becomes absolute in its effect. The fact that the defendant, at the time, supposed he did not owe the plaintiff anything, and so claimed, cannot alter the case. His impression that he had paid the plaintiff does not evince an unwillingness to pay him, if the fact of payment should be found against him. In *Paddock v. Colby*, 18 Vt. 485, there was a denial of anything due, yet a willingness to settle the debt, if established; and in *Hill v. Kendall*, 25 Vt. 528, the defendant said, if he had not paid the debt he would pay it; and, in both cases, a debt being found to be due the plaintiff, it was held that the statute bar was removed. This case is within the principle of those cases.

We think the other part of the plaintiff's claim is within the statute of frauds. The defendant requested the plaintiff to bring the suits for Spear, and had authority to do so from Spear; and, when the plaintiff refused to bring the suits unless the defendant would become responsible to him for his advances, he assured the plaintiff that "*Spear was good*, and, if not, that he was." The auditor finds that the defendant was not liable, except as above stated, and though it is found that Spear was not responsible, yet the defendant is not chargeable with having acted in bad faith.

There was an *original liability* on the part of Spear. The defendant was the agent of Spear to carry the papers to the plaintiff and request the suits brought, and this agency was made known to the plaintiff. There is nothing in the case to show anything more

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than a collateral undertaking on the part of the defendant. "Spear is good, if not, I am." The meaning of which is, if he does not pay you for the advances, I will. The case is always within the statute of frauds, where the undertaking is *collateral*. What was said by the defendant to the plaintiff, at the time the writ in this case was served upon him, clearly had reference to the claim of the plaintiff for advances in the Spear suits, that is, "that it did not belong to him to pay,—it was the business of another man, and he had got into difficulty by carrying papers which belonged to another." Though he said, in the conversation, the debt was of long standing, and he would pay it, yet there was no consideration for this promise, and it could not convert a *collateral* promise into an *original* one.

We think that, notwithstanding what is said in the report about the plaintiff's going into bankruptcy, in 1842, he may still maintain his action on this account. No charges or accounts against this defendant appeared upon the plaintiff's books, and this claim of the plaintiff was not included in the schedule of claims annexed to the petition of the plaintiff to the district court of the United States, seeking for the benefit of the bankrupt law. Although the schedule professed to contain an accurate inventory of the plaintiff's property, rights and credits, of every kind and description, yet the present claim was not before the district court, and was not a subject of their action; and we apprehend the defendant cannot set up the facts detailed in the report to toll the plaintiff's right to maintain this action against him.

The judgment of the county court is reversed, and judgment entered up on the report, upon the principles herein settled.

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JOHN WOODROW v. JOHN O'CONNER.

Foreign law. Arbitration note. Award.

If the subject-matter of a controversy in our courts arose in a foreign jurisdiction, by the laws of which it should be governed, it cannot be judicially noticed that those laws are different from our own, unless they are shown, by evidence, to be so.

An arbitration note, or a note executed and placed in the hands of arbitrators to be delivered to the other party, if he should recover, becomes a valid obligation upon the making of a valid award in his favor, and the delivery of the note to him; and when so delivered, a recovery may be had upon it under the money counts.

It is no objection to an award that neither the arbitrators or witnesses were sworn, if the law did not require it, or the parties agreed that they need not be,—nor is it any objection that the umpire was appointed before the arbitrators entered upon the business submitted to them, or that the arbitrators joined with the umpire in making the award.

In an action for the recovery of the amount of an award or of an arbitration note, the award cannot be collaterally impeached by showing that the plaintiff procured it by means of false testimony, which was known by him to be so.

ASSUMPSIT. The first count in the plaintiff's declaration was for money had and received, and the remaining counts were upon an award of arbitrators, but, during the trial, the plaintiff waived the counts upon the award. The defendant plead the general issue, and the case was tried by jury, at the January Term, 1856,—POLAND, J., presiding.

Upon the trial, the following facts appeared which were not controverted by either party. At the time of the transactions referred to, both the plaintiff and the defendant lived in Hereford, Canada East. In December, 1848, a controversy arose between them which they mutually agreed to submit to Hugh Kennedy and Daniel Sherman. After they had assembled for the purpose of having the hearing before said arbitrators, a written submission was made and signed by the parties, dated the 12th of September, 1848, and delivered to the arbitrators. At the same time the plaintiff and the defendant each executed a note for the sum of twenty-five dollars, payable to the other, and these notes were delivered to said arbitrators with directions to keep them till the award was made, and then to deliver both notes to the party in whose favor the award should be; and if the amount awarded against the losing party should not be as much as said note, then the arbitrators were

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to endorse said note down to the amount of the award. It was at the same time agreed by the parties, that the arbitrators were to reduce all the testimony before them to writing, and, in case they could not agree as to the decision of said matter, they were to submit such written evidence to Joseph Lougee, Esq., a magistrate, and he was to act as umpire with said Kennedy and Sherman.

The parties thereupon proceeded to trial before said arbitrators, and, there being no magistrate near, it was agreed that neither the arbitrators or witnesses should be sworn, and they were not. Each party had several witnesses who testified before said arbitrators. The said Kennedy and Sherman did not agree in the award, and accordingly, with the consent of the parties, they submitted the evidence taken in writing by them to said Lougee, and then the said three arbitrators proceeded to make an award in writing, which was in favor of the plaintiff. Shortly after the award was made, the arbitrators met the parties, and read their award to them and delivered it and the two notes to the plaintiff, the defendant making no objection thereto, and the balance of the award against the defendant being for more than \$25.00.

It appeared that, by the laws of Canada, where an arbitration is not under a rule of court, the arbitrators and witnesses need not be sworn unless required by one of the parties. The plaintiff claimed to recover the amount of said note; and the defendant did not claim that said note or award had ever been paid; but offered to prove that, upon the trial of said cause before said arbitrators, the plaintiff procured his witnesses to state falsely before said arbitrators, and that upon their evidence the arbitrators found the facts to be as the plaintiff claimed, when the same were false, and so known to be by the plaintiff. The plaintiff objected to this evidence and the court excluded it, to which the defendant excepted. The defendant claimed also that, upon the above state of facts, there was no sufficient consideration to sustain said note, but the court ruled otherwise, and directed the jury to return a verdict for the plaintiff for the amount of said note and interest, to which direction the defendant also excepted.

Upon the trial, the defendant objected to the admission of all the papers above referred to, and also to all the parol evidence by which the other facts than those appearing from said papers were proved,

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but the court overruled the objection, to which the defendant also excepted.

Cooper & Bartlett and *O. Ray* for the defendant.

The award of these arbitrators was the only valid consideration for this note.

The submission in this case was in writing, and is the only proper evidence of what the parties agreed to do.

Parol evidence to show that Lougee was umpire was inadmissible, as was also all parol evidence of the agreement of the parties to the award to alter or vary or in any way control the written submission.* 2 Stark. Ev. 995-1000. *McGregor v. Bugbee*, 15 Vt. 734. *Jones v. Webber*, 1 D. Chip. 215. *Bradley v. Anderson*, 5 Vt. 152. *Bradley v. Bentley*, 8 Vt. 243.

This arbitration and award all rest in parol.

The arbitrators transcended the authority given them in the submission by attempting to award what the submission makes no provision for, and this too is the act of all three.

This is a foreign award, and is no more conclusive than a foreign judgment.

Foreign judgments may be impeached, especially of courts not of record. 1 Stark. Ev. 209, 3d ed.

In Vermont an award is no further conclusive than a judgment at law.

In this case the arbitration arose collaterally, as the consideration of the note, and is subject to be impeached for the fraud or corruption of the party.

H. A. Fletcher for the plaintiff.

The count for money had and received is as appropriate as a special declaration either upon the award or note.

A promissory note may be given in evidence upon a count for money had and received. *Edgell v. Stamford*, 6 Vt. 551.

So a sum of money awarded to be paid, may be recovered in an action for money had and received. *Bates v. Curtis*, 21 Pick. 247. See also *Keen v. Battshose*, 1 Esp. 194.

Notes executed at the time of the submission, deposited with

* The submission was not among the papers furnished to the reporter.

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referees or arbitrators, to be reduced by endorsements to the amount of the award, are held valid. *Town v. Jaquith*, 6 Mass. 46. *Batty v. Button*, 13 Johns. 187. *Page v. Pendergrast*, 2 N. H. 233. See also 17 Johns. 301.

In arbitrations the parties select their own judges, by whose decision and award they are bound, and the agreement of the parties will also be binding upon them. The agreement of the parties was that neither the arbitrators or witnesses should be sworn, and the objection that they were not sworn has no weight. See *Town v. Jaquith*, 6 Mass. 45. .

The appointment of Lougee as umpire is good, though made before the arbitrators entered upon the business referred to them. 2 T. Rep. 645. *Bates v. Cooke*, 9 B. & C. 407. And the arbitrators may well join with the umpire in making the award. *Soulsby v. Hodgson*, 3 Burr. 1474.

Indeed the submission says that the umpire was to act with the said arbitrators, and accordingly, with the consent of the parties, the arbitrators submitted the evidence to said umpire.

The award is in the nature of a judgment, and it cannot be impeached by evidence tending to show that the plaintiff obtained the award by false testimony. 2 N. H. 234.

It is further objected that there is no consideration for the note. The short answer to this exception is, that the submission of the matters in difference between the plaintiff and the defendant, and their undertaking to pay, form a good and sufficient consideration. 2 N. H. 233.

The opinion of the court was delivered by

BENNETT, J. The facts in this case all appear upon the bill of exceptions, and the case states that they were not controverted on the trial. It appears that the notes, submission and award were all made in Canada East, where both parties, at the time, resided, and hence it must be regarded as a Canada transaction, and to be governed by the Canada laws. We cannot, however, take judicial notice of the laws of Canada, and there being no evidence before us as to what those laws are upon the facts now before us, we are to assume that there is no distinction between those laws and our own. The question then is, cannot the plaintiff recover the amount

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due upon his note? We discover no reason why the award was not binding upon the parties.

It appears that the parties agreed that neither the arbitrators nor witnesses need be sworn, and the defendant cannot now make such an objection. Besides the exceptions show that by the laws of Canada, when the arbitration is not under a rule of court, the arbitrators and witnesses need not be sworn, unless required by one of the parties. There can be no objection that the umpire was appointed before the arbitrators entered upon the business submitted to them. *Roe on the demise of Wood v. Doe*, 2 Term 644; and both arbitrators might well join with the umpire in making the award. See *Soulsby v. Hodgson*, 3 Burr. 1474; and indeed the submission contemplated that the umpire was to act in conjunction with the arbitrators.

The evidence offered by the defendant that the plaintiff procured the award to be made in his favor by means of false testimony induced by him, was properly excluded. The award is in the nature of a judgment, and cannot be thus collaterally impeached. *Bulkley v. Stewart*, 1 Day 130. *Page v. Pendergrast*, 2 N. H. 234. If there was a binding award between the parties, a recovery may well be had upon the arbitration note, as it is called. It was decided by the supreme court, as early as 1819, that arbitration notes were valid. *Bagley v. Wiswall*, Brayton 23. The objection that there is no sufficient consideration is unfounded. The note takes effect from the time it was delivered over to the party by the arbitrators, and if at that time there is a valid award, in a certain sense, the note takes the place of the award, and there is a most ample consideration to support the note. See *Batty v. Button*, 13 Johns. 187. *Page v. Pendergrast*, 2 N. H. 233. See also 17 Johns. 301.

If the note is valid, a recovery might well be had on the money count. It seems the plaintiff waived his counts upon the award.

We think the judgment below should be affirmed.

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HORACE WALKER v. JOSEPH BARRINGTON.

Revocation. Book account.

The bringing of an action on book account is not, *per se*, a revocation of an authority previously given by the plaintiff to the defendant to pay to a third person certain items in the plaintiff's account. If the defendant, after the commencement of the suit but before the audit, pay such items to a third person in pursuance of an authority previously given, and not revoked, he should be allowed for such payment, although he thereby obtains a balance of the account in his favor.

BOOK ACCOUNT. In the plaintiff's account were charges which were allowed in his favor, for a shoat, and for a quantity of coal sold to the defendant. Items 17 and 18, in the defendant's account were "for cash for pig, paid to Wilbur Barrington," and "for cash for coal, paid to the same," which the auditor disallowed, subject to the opinion of the court upon the following facts.

At the time the plaintiff let the defendant have the shoat and coal, the defendant was to pay for the same to his father Wilbur Barrington, and so offered to do; but said Wilbur refused to receive it, for the reason that he thought it would affect certain contracts between him and the plaintiff. Said sums were not paid by said defendant to his father until the 15th day of December, 1855, which was after the commencement of this suit. The balance reported in the plaintiff's favor was five dollars and seventy-nine cents. The items 17 and 18, in the defendant's account, amounted to thirteen dollars and thirty-nine cents.

The county court, January Term, 1856,—POLAND, J., presiding,—rendered judgment on the report for the plaintiff for the above balance reported in his favor. Exceptions by the defendant.

G. C. & G. W. Cahoon, for the defendant,—argued that it was a part of the contract for the sale of the coal and the pig, that they were to be paid for to the defendant's father, and that this part of the contract could not be revoked or rescinded by one party without the consent of the other; that there was never any default in the defendant in fulfilling the contract, on his part, according to his agreement; and if otherwise, that it only constituted a breach of a special contract, for which the action on book would not lie; and cited 1 Swift's Digest 582; *Miller v. French*, 1 Aik. 101; *Smith v. Smith*, 14 Vt. 440; *Bailey v. Bailey*, 16 Vt. 656.

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W. Heywood for the plaintiff.

The commencement of this action was a revocation of all authority to pay the price of the coal and shoat to Wilbur Barrington. Wilbur Barrington had no claim on the money, for he had refused it. The right of action, therefore, was always in the plaintiff. Wilbur Barrington never had a cause of action. Shortly before the trial before the auditor, the defendant paid the price of the coal and shoat to Wilbur Barrington, but we contend that this payment cannot avail him.

The plaintiff had a good cause of action when he commenced this suit, and was entitled to a balance on his account, and costs. A payment of the balance of the account would not defeat this suit without a payment of costs also; *Stevens v. Briggs*, 14 Vt. 44; *Bellnap v. Godfrey*, 22 Vt. 288; *King v. Hutchins*, 8 Foster 561.

The fact that Wilbur Barrington was no party to the agreement upon which he was to receive the pay for the coal and shoat, and that he refused to receive the money, makes this case differ from the case of *Keyes v. Carpenter*, 3 Vt. 209.

The opinion of the court was delivered by

BENNETT, J. The only dispute in this case is in relation to items 17 and 18 in the defendant's account. If the defendant is not entitled to recover for these items, the balance on the accounts, as allowed, is for the plaintiff. The auditor finds that at the time the plaintiff let the defendant have the shoat and the coal, it was agreed that the defendant was to pay the amount for the same to the father of the defendant; and that the defendant offered to pay his father, but he at first declined to receive the pay, for reasons assigned in the report; but the case finds, as we understand it, that he did pay his father the two items, on the 15th day of December, 1855, which was after the suit was commenced, but before the audit. It being a part of the agreement, when the shoat and coal were sold to the defendant, that payment should be made for the same to the father of the defendant, it may well be questioned whether it was competent for the plaintiff to countermand the authority to pay the amount to the father. But be this as it may, it is quite clear, we think, that the bringing of this suit is not, *per se*, a revocation of the authority; and there is nothing else in the case

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to ground such a claim upon. There were running accounts between these parties, which the action was brought to settle; and the auditor has not found any revocation, in fact, of the authority to make payment for these items to the father.

We think, then, the judgment of the county court should be reversed, and judgment be rendered, on the report, for the defendant, allowing to him items 17 and 18, in his account,

JOHN F. CARR, *apl.* v. ISRAEL W. TYLER.

Authority of indifferent person to serve justice writ not extended by alteration of return day without the justice's concurrence.

The alteration of the return day of a justice writ, so as to make it returnable at a later day than the one appointed at the time the writ was signed, will not extend the previous authorization of an indifferent person to serve the writ beyond the time within which it should have been originally served, if such alteration is made without the concurrence of the justice.

This was an action appealed from the judgment of a justice. The defendant filed a plea in abatement, as follows.

"And now the said defendant, by Ossian Ray his attorney, comes and defends, &c., when, &c., and prays judgment of the writ aforesaid, and says that the same ought to abate, because he says that the plaintiff's writ was never, at any time, served on the defendant by any proper officer, or person legally authorized to serve the same; and that no service of said writ was ever made on the defendant, except the pretended service of the same made and endorsed thereon by one Samuel Blood, and by him subscribed; that the plaintiff's said writ was signed by Heman Nichols, a justice of the peace in and for Essex county, and dated and issued by said justice on the 30th day of January, 1855, and made returnable before him on the first Saturday of April, 1855, at one o'clock in the afternoon; that said Samuel Blood was not authorized to serve and return said writ by the justice aforesaid, at the time said

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writ was so made, dated and issued by him as aforesaid, nor at any time since then, but that the pretended authorization of said Samuel Blood to serve and return said writ, which appears on the back thereof, and signed by said justice, was made and endorsed thereon a long time before the said plaintiff's writ was dated and issued by him as aforesaid, and that the said pretended authorization was made and endorsed thereon when the plaintiff's writ was dated and made returnable at some day previous to the said 30th day of January, 1855; and that the justice aforesaid has, in no way, recognized, ratified or confirmed the said pretended authorization, since the same was first endorsed upon the plaintiff's writ, all of which the defendant is ready to verify. Wherefore, he prays judgment of the plaintiff's writ, that it may be quashed, and for his costs."

No copy of either the original writ, or of the replication to the above plea, came into the hands of the reporter.

The county court, May Term, 1855,—adjudged that the writ abate, to which the plaintiff excepted.

Cooper & Bartlett for the plaintiff.

This plea in abatement all taken together shows Blood properly authorized, and that the service is sufficient to hold the defendant.

The justice judicially determined two facts; 1st, That the writ was likely to fail of service for want of a legal officer; 2d, That Blood was a proper person to serve the writ. This was a compliance with the statute; *Kellogg ex parte* 6 Vt. 509.

The alteration of the return day of a justice writ does not change the process; and no sound reason can be given why it should avoid the authorization.

Suppose a writ made returnable on Sunday by mistake, and some one authorized to serve it, but before service the error is discovered, and the return day altered by the plaintiff, and service made by the person authorized, without calling on the justice; is not that service good?

This plea is bad in form; it commences and concludes with a prayer of judgment, while the matter pleaded is *dehors* the writ. Apparently, upon inspection, the writ is right; *Langdon v. Roberts*, 20 Vt 286

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It does not aver in what way, or by whom the writ was served. This should appear affirmatively ; 20 Vt. 286.

O. Ray for the defendant.

I. The authorization of a special officer, to make service of process, is a judicial act which can be exercised only by the authority signing the process ; *Kelly v. Paris et al*, 10 Vt. 261 ; *Ross v. Fuller et al*, 12 Vt. 265 ; and this authority cannot be delegated. The magistrate must determine not only the fitness of the person, but of the occasion ; and the fitness of the person with reference to the particular case ; *Kelly v. Paris et al, ubi supra*.

II. When the plaintiff's writ, as first made out, failed of service, Blood's authority to serve the same expired also ; and nothing could give him power to serve it, after being re-dated, except a new appointment.

III. The writ, as first made out, and failing of service, is to be treated as a blank. If the plaintiff had made another writ against the defendant, instead of altering the date of this one, the appointment of Blood to serve one of them, would have conferred no authority upon him to serve the other.

The opinion of the court was delivered, at the circuit session in September, by

REDFIELD, CH. J. The only question attempted to be raised in this case, as we understand the pleadings, is whether the authorization, by a justice of the peace, of an indifferent person to serve and return a writ before such magistrate, is *functus officio* when the time of service expires, or may be revived by extending the return day of the writ without the concurrence of the magistrate. At first we were inclined to say the authority to serve the writ, was revived by the alteration of the return day of the writ. It has been held that such alteration is not the making of a new writ, within the statute prohibiting sheriffs from making writs ; and such a writ, altered from one originally made returnable at a different day, is not to be regarded as a writ signed in blank.

But still we are satisfied that if the ground of argument assumed in *Kelly, v. Paris*, 10 Vt. 261, is sound, that the justice must determine the "occasion" for appointing a special officer to serve the

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writ, then the authority should be regarded as expiring with the time within which the writ might be served, as originally issued. For although the fitness of the person to serve the process is determined, with reference to the action, the parties, and all other incidents, absolutely, still the necessity of such an officer being appointed upon the occasion or emergency is only determined up to the time limited in the writ for service. Beyond that, the justice has not adjudged the necessity of any such appointment. And if the mere alteration of the return day of the writ is to determine the extension of this necessity to all after time, one very essential element in the discretion is chiefly taken from the justice.

That the occasion for the particular appointment was regarded as a very important point in the exercise of the discretion by the magistrate, will be apparent from an examination of the statute, conferring the authority. It is in these words "Whenever it shall be made to appear to a justice that any precept returnable to him may fail of service, for the want of a proper officer, seasonably to be had, he may authorize, &c. And the very *casus agendi*, or contingency in which he may act, is made to depend upon its being shown that the precept may fail of service by reason of no officer being seasonably to be had. And although it is, no doubt, a question resting absolutely in the discretion of the justice when the contingency does occur, it is certainly most unsound to infer that because he determines the contingency, upon one state of facts, up to a certain time, that any one, at will, may extend it indefinitely. Such a construction seems to us directly at variance with the language and the purpose of the statute.

Judgment affirmed.

Frizzle v. Dearth et als.

ELIJAH FRIZZLE v. FREDERICK P. DEARTH, DOROTHA DEARTH
his wife, ELVIRA FRIZZLE AND AMANDA FRIZZLE.

[IN CHANCERY.]

Mortgage for support of mortgagee.

The orator in the present case having a mortgage for his support, the condition of which had not been performed, had retaken possession of the premises and for several years supported himself;—*held* entitled to a decree quieting in himself the absolute title to the premises.

APPEAL from the decree of the court of chancery. The orator in his bill alleged that on the fifth of May, 1845, he owned certain lands in Canaan, of the value of fifteen hundred dollars; and to secure to himself and his wife Mary, who were old and infirm, their support for life, he conveyed the same to his son Amasa Frizzle, together with certain personal property; and his said son Amasa thereupon gave to the orator an obligation or promise in writing to pay him and his wife annually, during their lives, eight bushels of wheat, ten bushels of buck-wheat, four bushels of corn; fifty bushels of potatoes, three hundred pounds of pork, twelve pounds of tea, six pounds of snuff, six pounds of tobacco, six pounds of salæratus, seventy-five pounds of sugar, fifteen pounds of tallow, twenty pounds of butter, seventy-five pounds of cheese, one bushel of salt, and good comfortable clothing, and shavings and fire-wood; and further agreeing to keep for them one cow and one horse, during their lives, if they should want it, and in case of sickness to furnish doctoring, and a good comfortable home to live in during their lives; and secured the same by a mortgage of said premises, in the condition of which he also agreed to pay \$200, on a previous mortgage on said premises, to Gilbert L. Frizzle and Stillman Blood; that the said Amasa performed said agreement until his death which occurred on the 24th of February, 1848; after which his widow Dorothea performed said agreement, until the first of January, 1849, when, the said two hundred dollars on the previous mortgage being still unpaid, and the said Dorothea being unable to pay the same, or further perform said agreement, it was agreed that the contract should be rescinded, and the orator reinstated in his title to the premises; and to accomplish this object, the obligation of the said Amasa was delivered up to

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the said Dorotha and cancelled, but no reconveyance of said premises was made to the orator, who ever since that time had been in possession of them, and had supported himself and his wife, and had paid said prior mortgage of two hundred dollars; that no administration had ever been granted on the estate of the said Amasa, but that all the debts due from him had been paid; that he left two daughters, Elvira and Amanda, who were his only heirs, and were minors residing with their mother, never having had any guardians appointed for them, and that his said widow Dorotha had since married Frederick P. Dearth, to both of whom he had applied for an acquittance of their interest in the premises, which they had declined to give, averring that there was no necessity therefor. The bill prayed that the court would appoint guardians *ad litem*, to answer and defend for the said Elvira Frizzle and Amanda Frizzle; and that they, by their guardian, and the said Frederick P. Dearth and Dorotha his wife be decreed to release to the orator all their right, title and interest in and to the premises, &c.

The defendants Frederick P. Dearth and Dorotha his wife, and the said Elvira and Amanda Frizzle by the said Frederick P. Dearth, as their guardian *ad litem*, answered the bill, admitting the conveyance of the premises to the said Amasa, the promise and mortgage of the said Amasa, his death, and the performance by him of his said promise and obligation up to that time; and further setting up and insisting that the two hundred dollars referred to in the condition of his mortgage was also paid by him before his death; and that the said Dorotha performed said agreement until about the fifth of May, 1849, and that she had always been ready and willing on her part to do so, but that on or about the 8th of May, 1849, the orator and his son, Benjamin C. Frizzle, applied to the said Dorotha, then a widow, and requested that she should, and that upon their request she did give the said Benjamin a deed of her interest in the property, and transferred to him the personal property her husband had received of the orator; in consideration of which, the obligation of the said Amasa was surrendered to her, and she and the estate of said Amasa released from a performance of it; but denying that it was agreed or understood that the equity of redemption in the real estate was to be surrendered, and the

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orator reinstated in his title to the same ; and insisting that by reason of what then and there took place, the conditions in the mortgage deed were in effect satisfied, and the mortgage discharged ; and further setting forth, that in June, 1849, the said Benjamin C. Frizzle died, and that soon thereafter his administrator returned to the said Dorothea her deed of her interest in said premises, which she had executed to the said Benjamin, but which had never been recorded ; which, at the request of the said administrator she received and destroyed ; and that ever since that time she had been ready and willing, notwithstanding the surrender to her of the obligation or promise of the said Amasa, to perform and fulfill it ; and, if there was any part of said two hundred dollars mentioned in the condition of his mortgage, which was unpaid, to pay it ; but that the orator had, since the death of said Benjamin, been in possession of said premises, the income and profits of which, if carefully managed, were sufficient for his support and that of his wife, and that the defendants were ready and willing to supply any deficiency which there may have been in this respect.

The answer was traversed and testimony was taken, the conclusions which are deduced from it being sufficiently stated in the opinion of the court.

[The reporter has no statement or information as to the decree made by the court of chancery, except that contained in the opinion of the court, by which it was affirmed.]

W. Heywood for the orator.

Cooper & Bartlett for the defendant.

The opinion of the court was delivered, at the circuit session in September, by

REDFIELD, CH. J. From the bill, answers and testimony in this case we are satisfied that after the death of Amasa Frizzle, his widow, the defendant Dorothea, became anxious to be relieved from the further performance of the contract, after the supplies her husband had furnished were exhausted, and she had herself furnished them one year, and requested the orator to make some arrangement for that purpose, which was finally effected by Benja-

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min C. Frizzle assuming the duty of maintaining his father and mother, and taking the property. At this time, it is very obvious, all the parties concerned were fully satisfied with the arrangement which was made, and the widow of Amasa, the defendant Dorotha, gave a full release of the land which seems to have been regarded, at the time, as sufficient to vest the title in Benjamin C., and she received all she demanded for what she and her husband had done towards the performance of the contract.

Benjamin C. soon deceased, and this deed was surrendered to the defendant Dorotha, because the administrator could not be allowed to undertake the performance of any such contract. But the orator still continued to get his support out of the property, without any aid from Dorotha, or any one on her behalf, she, in fact, regarding herself as released from the contract, and so she seems to have been regarded by all concerned till the bringing of the bill in this case.

The property having been surrendered to the orator, since the death of his son Benjamin C., and he having been left to shift for himself, it seems to us reasonable that the title should be quieted in him. There seems to have been such a failure to perform the contract, that, upon this bill to foreclose the equity of redemption in the defendants, the orator is entitled to the decree asked for. The case is similar in its equities to that of *Devereaux v. Cooper*, 11 Vt. 103. The mortgage seems to have been paid off by means of property coming from the orator. There is no cross bill claiming anything on the ground of part maintenance. It would be difficult, if not impossible, for the heirs or personal representatives of Amasa to perform this contract. And now, after having been abandoned for so long a time by them, it will be impossible for them to make amends for past delinquencies. The decree of the court of chancery seems to have been in all respects equitable, and it is affirmed.

We see no good reason why the defendants should be entitled to costs in this case, as in a bill to redeem. It is more like a bill to foreclose.

Decree affirmed.

Hall v. Nasmith.

THOMAS HALL v. WILLIAM G. NASMITH.

Statute of limitations; absence from the state. Pleading.

Mere absence from the state will not prevent the operation of the statute of limitations while the debtor retains a residence in it by which process may be served upon him.

If the debtor has his fixed residence out of the state, all of his absences from the state are to be deducted from the time during which the statute of limitations would otherwise be running.

A replication, to a plea of the statute of limitations, that before the statute had run to wit, from January 1, 1848, to the commencement of the suit, the defendant was absent from and resided out of the state, does not assert a continuing absence, or an absence, construing the averment against the pleader, for more than a single day.

A rejoinder to such a replication that within the time mentioned the defendant was frequently in this state to the knowledge of the plaintiff, *held* sufficient.

ASSUMPSIT. The date of the writ does not appear in any of the papers in the hands of the reporter. The defendant plead the statute of limitations; to which the plaintiff replied "that after his said cause of action accrued, and before the statute of limitations had run thereon, to wit, from the first day of January, 1848, to the time of the commencement of this action, the said Nasmith was absent from and resided out of this state, to wit, at Northumberland, in the state of New Hampshire; and during all of the time aforesaid, he, the said Nasmith, had no known property within this state, which could, by the common and ordinary process of law, be attached."

The defendant rejoined, "that, within the time mentioned in the said replication, he was frequently in this state, to wit, at Guildhall, in the county of Essex, to the knowledge of the plaintiff, when and where the plaintiff could have served the process upon him, the defendant."

To this rejoinder the plaintiff demurred, and the county court, May Term, 1855,—POLAND, J., presiding,—adjudged the rejoinder insufficient, to which the defendant excepted.

J. Steele for the defendant.

It is admitted by the pleadings, on the part of the plaintiff, that although the defendant, after the cause of action accrued, resided out of the state, that he was not absent from the state, and that he

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was in Guildhall, days and weeks, within the knowledge of the plaintiff.

By the Compiled Statutes, p. 379, § 14, it is as necessary that the defendant in this cause should be absent from the state as it is that he should reside out of the state, to prevent the statute of limitations from being a bar to the action.

W. Heywood for the plaintiff.

The defendant, by his rejoinder, tenders an immaterial issue. He misapprehends the statute by supposing that a frequent coming into the state will have the same effect to bar the claim as a residence in the state; *Gilman v. Outts*, 3 Foster 376.

The opinion of the court was delivered, at the circuit session in September, by

REDFIELD, CH. J. The question attempted to be raised here, in general terms, is, what will obviate the effect of absence from the state, which, by our statute, suspends the operation of the statute of limitations. And the first inquiry is, whether every absence, and, if not, what absence from the state suspends the operation of the statute. The language of the statute is "shall be absent from and reside out of the state." It is obvious, we think, that mere absence from the state is not sufficient. The person must be absent from and *reside out of the state*. Temporary absences from the state, upon journeys, or, indeed any absence, while having a residence in the state by which service may be made upon the debtor, is not to be taken into the account. *Hackett v. Kendall*, 23 Vt. 275. But if the party be absent from the state, leaving no such domicile in the state, this will suspend the operation of the statute. Or, if the party have a fixed residence out of the state, all his absences from the state are to be deducted from the term of limitation fixed by the statute.

It will follow then that, to break the suspension of the time, the debtor must either acquire a domicile within the state, or else remain in the state. Whether it is indispensable that his return to, and remaining in the state, shall be known to the creditor, is, perhaps, questionable. It would, from the statute, and the decisions in other states, seem probable that this is not essential. *Didier v.*

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Davidson, 2 Sandford's Ch. R. 61; *Mazon v. Foot*, 1 Aik. 282; *Hill v. Bellows*, 15 Vt. 727. *Didier v. Davidson*, 2 Barb. Ch. 477. It would seem to be sufficient to break the suspension when the debtor either returns, or takes up his residence in the state, in an open and public manner so that the creditor, by the use of diligence, might be able to serve process. In some of the states, the statute only provides for deducting a single absence from the limitation. *Cole v. Jessup*, 2 Barb. Sup. Ct. R. 309. Such seems to have been the plaintiff's view in the present case. But our statute evidently provides for the deduction of all absences of the debtor from the state, while he resides out of the state. And the question of the continuing absence and non-residence may be determined, upon a general traverse of the defendant's plea, by giving the proof of return in evidence. *Graham v. Schmidt*, 1 Sand. Sup. Ct. R. 74.

In some of the states, even temporary absences are to be deducted from the time of limitations. *Vand v. Huston*, 4 Gilm. (Illinois) 125. In other states where the terms of the exception are, if the debtor shall be without the state, temporary absences are not taken into the account. *Sage v. Hawley*, 16 Conn. 106. It seems to be the purpose of the statute of this state that the creditor shall have the full term of limitation in which to bring his action. When the debtor relies upon a return into this state as an excuse for the plea of absence, he should, ordinarily, reply a continuing residence or commorancy within the state. But in the present case, as the plaintiff does not assert any continuing absence before the debt was barred, which is the more common mode of drawing such replications, but only that the defendant was absent from the state before the debt was barred, which, on the common mode of construing pleadings against the pleader, could make but an absence of a single day, the rejoinder of "frequently in the state," will of necessity supply this one day, and thus make out the full term of the statute, wherein the party might have brought suit.

Judgment reversed; but as both the replication and the rejoinder seem defective in regard to raising the real question which the parties seem desirous of trying, it seems proper to allow both parties to amend their pleading without terms.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF VERMONT,

FOR THE

COUNTY OF CALEDONIA,

AT THE

APRIL TERM;

AND AT THE

CIRCUIT SESSION, IN SEPTEMBER, 1856.

PRESENT,

HON. ISAAC F. REDFIELD, CHIEF JUDGE.

HON. PIERPOINT ISHAM, } ASSISTANT JUDGES.

HON. MILO L. BENNETT, }

CHARLES D. STAPLES v. PORTER FLINT.

Equitable claim of plaintiff against another no defense to his legal claim, arising out of the same matter, against the defendant.

The defendant gave the plaintiff a written lease of certain premises, and before the expiration of it he deeded the same premises to a third person without making any reservation of the plaintiff's rights. *Held*, that the fact that the grantee had such notice of the plaintiff's rights as would enable the plaintiff to maintain them in a court of equity, constituted no defense and would not prevent the plaintiff from pursuing the defendant on his contract in an action at law.

Staples v. Flint.

ASSUMPSIT upon a lease of a certain piece of land, from the defendant and Franklin Larned, (as to whom a *non est inventus* return was made on the plaintiff's writ,) to the plaintiff, upon which to erect a bowling alley. Plea, the general issue; trial by jury, June Term, 1855,—POLAND, J., presiding,—when a verdict was returned for the plaintiff. Upon the trial, exceptions were taken by the defendant, the nature of which, and the facts upon which they were founded, being sufficiently stated in the opinion of the court.

T. Bartlett for the defendant.

Peck & Colby for the plaintiff.

The opinion of the court was delivered by

REDFIELD, CH. J. The defendant Flint and his associate Larned leased to the plaintiff, by a writing, not acknowledged, the land on which to erect a bowling alley, as long as the building should be used for that purpose, upon certain conditions. After the alley was erected, they conveyed the land to a third party, representing to such party that the plaintiff had forfeited his lease by non-performance of certain conditions. It turned out, upon trial, that the plaintiff had not incurred such forfeiture. It is now urged that as the grantee of the land had notice of the plaintiff's title, he is bound by it, and may be compelled to confirm it. This is probably so. But the conveyance did vest the whole title in the land, as against the defendant and Larned, in the grantee; and we think the plaintiff is not bound to contest his claim in equity, with the grantee, which will only bring it around against the defendant in another form, if he prevails; but that he may go against the defendant, at law, upon his written contract.

Judgment affirmed.

Carpenter v. French.

HORACE CARPENTER v. MICAH FRENCH.

Contract.

A writing respecting the sale of the farm of the plaintiff to the defendant, which contained some agreement respecting the disposition of certain fodder then on the farm, was left in the possession of the plaintiff, who, not having it with him when the defendant met him to complete the purchase of the farm in pursuance thereof, gave to the defendant, before the delivery of the deed, and upon his calling for the original agreement, another writing agreeing to produce the first one, or take the defendant's recollection and construction of it. *Held* that this bound the plaintiff to take the defendant's recollection and construction of the original writing if not produced, though the plaintiff proved its loss, and swore to its being different in its provisions from those insisted upon by the defendant.

BOOK ACCOUNT. The plaintiff's account contained but one charge, which was for taking care of eighteen head of the defendant's cattle for ten and a half weeks in the spring of 1854, which the auditor allowed at \$ 12.96, subject to the opinion of the court upon the following facts.

In the fall of 1853, the plaintiff sold to the defendant his farm in Barre. The bargain in relation to the farm was made, and its terms, as understood by the parties were reduced to writing, and signed by the parties. This writing was kept by the plaintiff, with the understanding that he was to meet the defendant the next day at the town clerk's office with the writing and execute the deed.

The next day the parties did meet as agreed, and before the deed of the farm was delivered to the defendant, he called upon the plaintiff for the writing containing the terms of the bargain. The plaintiff informed the defendant that he had lost it, and the parties undertook to make out a substitute, in relation to the fodder, and the manner in which it was to be fed out, but not agreeing as to its terms, the plaintiff gave the defendant an obligation in writing, of which the following is a copy.

"This is to show that whereas Micah French signed a paper, of which I took the charge, and which I do not now find. I obligate myself to produce the same, or take his recollection and construction of it."

Both parties agreed that the original writing contained a stipulation that the plaintiff was to fodder his own stock on the farm till he left, which was to be in March, 1854, and that what fodder the plaintiff did not want for his stock, he was to sell to the defendant

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at a price to be agreed upon ; but they disagreed as to whether the plaintiff, in the bargain, agreed to feed, without compensation, the defendant's stock to be furnished at the barn-yard, out of certain fodder there which the plaintiff had sold to the defendant ; the plaintiff swearing that the writing contained no such stipulation, and the defendant swearing that it did. The auditor deeming that, by law, the burden of proof rested upon the defendant to make out the contract as he claimed it, found that he had failed so to do ; and that therefore the plaintiff was entitled to recover. The original writing was not produced before the auditor, and the loss of it was proved by the testimony of the plaintiff.

The county court, June Term, 1855,—POLAND, J., presiding,—rendered judgment on the report for the plaintiff for the amount allowed in his favor by the auditor. Exceptions by the defendant.

Peck & Colby for the defendant.

The question, decisive of this case, is as to the effect of the written contract of the plaintiff in which he binds himself to adopt the defendant's statement of the lost writing.

We insist that this agreement is valid, made on good consideration, and should be enforced in this suit by way of *estoppel*. As to consideration, the duty of the plaintiff to produce the lost writing, and the waiver of the defendant's right to it before proceeding to make out deeds, was a good consideration for the plaintiff's promise. As to its validity, it is the common case of an agreement to be bound by the decision of an umpire ; or more properly, it is an admission upon which the defendant was induced to act and did act, like the admission by a party for the purpose of trial, which is conclusive ; 2 Stark Ev. 21.

As to the remedy, it is obvious the agreement must be enforced in court specifically, or all remedy is denied. For if the defendant sues for the breach of the agreement, the plaintiff's testimony will still deprive him of recovery ; and if not, surely this judgment will be a conclusive bar.

G. W. Stone and J. A. Wing for the plaintiff.

The auditor having found the fact that the plaintiff performed the service, and the value of the same, there seems to be no rea-

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son why the plaintiff should not recover the amount allowed by the auditor.

It is claimed by the defendant that, by the second writing, the plaintiff bound himself to either produce the original writing, or be bound by what the defendant should claim it to be, no matter how absurd or ridiculous the claim should appear. This would be strange law; that the plaintiff would be bound to pay, or do whatever the defendant should claim it to be, without proof. This would place the plaintiff wholly in the power of the defendant, and at his mercy.

The auditor does not find that the original contract contained any stipulation that the plaintiff was to fodder the defendant's cattle for nothing, and every circumstance shows that it could not have been so understood by either party.

The plaintiff claims that the original contract was void for want of delivery by the plaintiff. The second writing describes a contract signed by the defendant alone, and not a contract signed by both parties, consequently it purports to be a contract that the plaintiff held against the defendant, and not one of any binding force on the plaintiff. Therefore the second writing, unless aided by parol, shows nothing, and refers to nothing, and proves nothing of itself; and we claim that parol evidence will not aid it.

But if we bring in parol proof, the auditor has found that there was a writing made and signed by both parties, and left with the plaintiff. If so there was no delivery of the agreement that would be binding on the plaintiff.

The opinion of the court was delivered by

BENNETT, J. We think the defendant is entitled to judgment on the report. The question in the case is, whether, by the terms of the written contract in relation to the sale of the farm, the plaintiff was bound to fodder the defendant's cattle, as a part of that contract, and without any new consideration, or compensation; and whether it was to be done without compensation or not, was a point about which the parties were at issue. It was the duty of the plaintiff, as he was the keeper of the contract, to have it at his command. Before the deed was executed and delivered to the defendant, he called upon the plaintiff for the writing which contained

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the terms of the bargain, and the plaintiff said he had lost it. The parties could not agree upon the terms of a substitute in relation to the foddering, and, before the deed was delivered, the plaintiff gave the defendant the contract by which he obligated himself to produce the same, or take the defendant's recollection and construction of it. This agreement was made as a part of the transaction before the deed was delivered, and it cannot be regarded as a *nudum pactum*, and the defendant was fully justified in acting upon it. We think, then, the plaintiff must stand to the written contract as recollected and understood by the defendant.

Judgment of the court below reversed, and judgment for the defendant.

MOSES BUCHANAN & CO. v. ORANGE S. CLARK; .ORANGE G.
CLARK, *Trustee*.

Validity of conveyance to provide for future support.

A person not in debt may make a voluntary conveyance of his property for the purpose of securing his future support which will be valid against his subsequent creditors.

TRUSTEE PROCESS. Some years previous to 1836, the principal debtor Orange S. Clark, the father of the trustee, purchased a small piece of land in Groton village, for \$75. He made improvements, by building a dwelling house, and other necessary buildings for a family, so that it answered for a homestead, and was occupied by him as such. One Kimball, a relative of the family, assisted him to pay for the place, and took a deed of it in his own name, but held it in trust for the said Orange S., who paid Kimball to his satisfaction. In April, 1836, the said Orange S. was fearful that Kimball was going to fail in business, and he solicited his son Orange G. (the trustee) to take a deed of the place to himself, in trust for him and family. Orange G. was just in his majority and was unwilling to take a deed or have anything to do with it,—but,

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on the urgent request of his father and mother, he consented, on condition that the place was to be absolutely his and under his control, excepting that his father and mother and the minor children were to have a home, or he was to furnish a home for them so long as his father and mother lived. At this time, the said Orange S. was free of debt, and the reason why the property was not in his hands was that the family were apprehensive he would squander it, as he was in the habit of frequent intoxication.

The deed of the place was executed to the trustee on the 2d of April, 1836, and he paid no other consideration for it, than his agreement to furnish his parents with a home, as above stated. The place continued the home of the family as before, till about 1845, when, at the request of Orange S. and his wife, the trustee sold the same for \$300, and purchased another place with more land, and out of the village, for \$700, and the avails of the Kimball place were applied in payment of the last place, which was purchased of another son, Frost Clark.

Previous to the last purchase, the family had moved on to the place, and continued to live on it, applying the products of the place to the support of the family, without any accounting to the trustee for any portion of it;—the trustee all the time furnishing a good house, for the use of the place and family, until about four years since, when the mother deceased, and the trustee immediately took possession, taking care of his father, and giving him a home in his family.

The Frost Clark place was paid for by the trustee out of his own funds, excepting the \$300 for which the Kimball place was sold; and at this time a portion of the plaintiff's claim against the principal defendant, Orange S., had accrued.

Upon the foregoing facts reported by the commissioner, the county court, December Term, 1855,—POLAND, J., presiding,—discharged the trustee, to which the plaintiff excepted.

J. Potts for the plaintiffs.

The Kimball place remained the property of the principal debtor up to 1845, and subject to be set off on execution by his creditors, but not liable to be levied upon by the creditors of the trustee. It appears that, in 1845, the present trustee conveyed the trust estate

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to a third person, by virtue of an agreement or contract made between him and the principal debtor, and received therefor the sum of \$300, and this, too, after the plaintiffs' debt had accrued.

This transaction, we think, was fraudulent and void as against the rights of the plaintiffs; the only consideration therefor was the trustee's mere promise to furnish a future home for himself and family, and in this respect is similar to the case of *Crane v. Stickle & Trustee*, 15 Vt. 252, and *Jones v. Spear & Trustee*, 21 Vt. 426.

Dickey for the trustee.

The opinion of the court was delivered by

REDFIELD, CH. J. As the voluntary conveyance in this case, or contract for future support on the part of the principal debtor, with the trustee, was prior to the accruing of the plaintiffs' debt, or any part thereof, and seems to have been made in good faith, and strictly performed, we do not see how he can be charged as trustee. Such a contract is perfectly valid, as to subsequent creditors.

Judgment affirmed.

 AUSTIN M. GREEN v. WILLIAM MERRIAM.

Statute of frauds.

The plaintiff sold at auction, to the defendant, sixteen sheep for \$80.00. The sheep were then in a yard of the plaintiff, and he and the defendant drove them into another yard of the plaintiff, and the defendant then told the plaintiff, if he would keep them until a certain day, he (the defendant) would then come and get them and pay all bills. This was assented to by the plaintiff, and the sheep were so kept, but at the expiration of the time the defendant declined to take them. *Held*, that the property was sufficiently accepted and received within the meaning of those terms as used in the Compiled Statutes, § 2 chap. 64, entitled "The prevention of frauds," &c.

BOOK ACCOUNT. The plaintiff's account was as follows.

"Feb. 23, 1854,

" To one ox-yoke, .	\$1 50
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" 16 sheep at \$5 each,	80 00
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" Keeping sheep 2 days by agreement,	50
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" Feb. 25, 1855, By cash,	\$1 50
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which the auditor allowed as charged, subject to the opinion of the court upon the following facts.

Sometime prior to the 23d of February, 1854, the plaintiff advertised that on that day he would sell at auction, at his residence in Sheffield, a large amount of personal property enumerated in his advertisement, and on that day he employed one James Roberts, as his auctioneer, to sell said property; and the plaintiff and said Roberts procured one Laban M. M. Gray, as a clerk, to keep an account and record of the sale.

The defendant bid off the ox-yoke and the sheep at the prices charged in the plaintiff's account, he being the highest bidder on each of the above named articles, and they were struck off to him by the auctioneer, and entered to him by the clerk, at the time, in a book in which he kept the sales, and this the defendant knew, and he made no objection to the same at the time. Awhile after the sheep were so struck off, the defendant inquired if the plaintiff had another yard where the sheep could be put away from the horned cattle, so as not to be injured by them; the plaintiff told him there was one, and they, with others, drove the sheep into another yard.

Near night, as the defendant was about starting for home, he told the plaintiff that the roads were so drifted, and the distance to his residence so great, that he should be unable to get the sheep home that night, and that if the plaintiff would keep the sheep until Saturday night he would come then, and get them, and pay all bills. The plaintiff replied that the sheep would have to stay with some colts, if they were left; to which the defendant said "I will risk the sheep if you will the colts."

The defendant came the next Saturday night and said that he was not obliged to take the sheep, that they were not what he supposed they were, and refused to take them, though requested to do so by the plaintiff; and he then took the ox-yoke and paid for it.

The plaintiff claimed that the changing the sheep into the other yard, as well as employing the plaintiff to keep them, amounted to such a delivery by the plaintiff and acceptance by the defendant as the statute contemplates, and the defendant claimed that it did not. The plaintiff further claimed that the memorandum made by the clerk of the auction was a compliance with the statute, and the defendant claimed that it was not.

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The county court, December Term, 1856,—POLAND, J., presiding,—rendered judgment for the plaintiff to which the defendant excepted.

J. P. Sætto for the defendant.

The defendant cannot be made chargeable for the sheep. He is relieved by the statute to prevent frauds and perjuries. Comp. Stat. chap. 64.

The facts reported by the auditor do not show a delivery.

To have amounted to a delivery, they must have been intended by the vendor as vesting the right of possession in the vendee, and there must have been an actual acceptance by the vendee with an intention of taking the possession as owner. See Chit. on Cont. 390.

The acceptance must be proved by some clear and unequivocal act of the party to be charged. *Snow v. Warren*, 10 Met. 132.

The plaintiff had not relinquished his lien upon the property for the price, and while the plaintiff retains his lien there can be no acceptance by the defendant that will avoid the statute. Chitty on Cont. 394, 395.

This sale was not an auction sale recognized by the laws of this state. We have no sales recognized as auction sales in this state except sheriff's sales.

E. A. Cahoon for the plaintiff.

The plaintiff did everything required of him to give the defendant full possession and control of the property, and the defendant not only took control of the sheep, but said to the plaintiff that he would risk the sheep, &c. The time of payment or credit was extended to Saturday when the defendant promised to pay all bills.

The acceptance of property, as a general rule, implies a delivery. *Redington & Co. v. Roberts*, 25 Vt. 686. In the case of *Chamberlain et als. v. Farr*, 23 Vt. 270, the court say in reference to a sale of straw, left in the vendor's barn, to be taken as the vendee desired, at an agreed price for the mass, that "in matters of such bulk, all that is necessary to constitute a delivery is that the contract of sale should be complete, the particular portion set apart by itself, nothing more remains to be done on the part of the

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vendor, and the vendee agrees to take the goods as they are and where they are." And Story on Sales, § 276, says, that "if a final and unequivocal appropriation of the property be implied from the acts of the parties, the statute is sufficiently complied with."

With reference to the statute of frauds, it would seem that a sufficient memorandum was made to perfect the contract, and make it binding, independent of delivery. This is so unless a distinction can be drawn between an auction and a voluntary public sale, where the same forms are adopted, and for such a distinction I can find no good reason. See opinion of Lord MANSFIELD, *Emerson v. Heelis*, 2 Taunton 46.

The opinion of the court was delivered by

BENNETT, J. It is claimed by the defendant that there can be no recovery by the plaintiff, because of the statute for the prevention of frauds and perjuries, (Comp. Stat. chap. 64,) but as applied to the facts of this case, the objection cannot be sustained. The only controversy is in relation to the sheep. The ox-yoke had been specifically paid for. The sheep as well as the ox-yoke were sold at public auction, and the defendant bid them off at the prices charged in the plaintiff's account. The plaintiff employed Roberts as his auctioneer, and the plaintiff and the auctioneer employed one Gray, as a clerk, to keep an account and record of the sales. The articles bid off by the defendant were entered to him by the clerk, at the time, in a book in which he kept the sales, and they were not only struck off to the defendant with his knowledge, but also entered to him by the clerk, and to all this he made no objection. The sheep were by the parties put into a yard by themselves; and before the defendant left, for the reasons assigned in the report, he engaged the plaintiff to keep the sheep for him until the following Saturday. We apprehend there was such a delivery of the sheep as to take the case out of the statute. Not only the title passed to the vendee, but also the possession of the sheep. The vendor became the bailee of the vendee, and his possession, by means of the agreement, became the possession of the vendee, and the sheep were entirely at his risk, and were to be maintained at his expense. If the purchaser shall accept and receive part of the goods sold, in the language of the statute, the case is not

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within it. See Comp. Stat. chap. 64, § 2. The same form of expression is used in the 17th section of the English statute of Charles II. of frauds and perjuries, except the word "actually" is inserted before receive, and the decisions under that section are of course applicable to us.

It may seem, perhaps, a little difficult to reconcile all the cases which have been decided under the English statute in regard to what shall constitute a delivery and what an acceptance, so as to take the case out of the 17th section of the statute. In *Elmore v. Stone*, 1 Taunton 457, the plaintiff, who kept a livery stable and dealt in horses, proposed to the defendant to sell him a pair at a given price, but the defendant offered a less price, which was rejected, but at length he sent word that the horses were his, and that the plaintiff must keep them at livery for him, and the plaintiff manifested his acceptance to this by removing the horses out of his stable into another stable, and it was held that the plaintiff from that time possessed them not as owner, but as the bailee of the vendee, and that after he had consented to keep them at livery for the defendant, he could not have retained them, although he had not been paid the price, and that consequently the case was not within the statute. In that case, according to the views taken by the court, the acts of the parties were such as clearly to place the horses within the power and under the exclusive dominion of the vendee. The case of *Howe v. Palmer*, 3 B. & A. 321, is decided upon the ground that there was no acceptance of the tares by the vendee. They were sold in market by sample, and though the vendee was to send to the vendor's farm for the tares, yet he, at the time, refused to receive the sample which was offered him, and requested that the tares might remain where they were until he wanted them, and this was acceded to by the vendor. In that case it was considered that no new relation was created between the vendor and vendee, and the fact that the tares were to remain on the plaintiff's farm till sent for, was a part of the contract. It is said that case differs from *Elmore v. Stone*, inasmuch as, in the latter case, the horses were transferred from the sale to the livery stable, and directed to be kept at the expense of the vendee, which certainly was evidence of acceptance by him. We think the case now before us is one where, from the

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facts found by the auditor, the county court might well have inferred a reception and an acceptance of the sheep by the vendee, which may be regarded, perhaps, as a mixed question of fact and law. After the sale, the sheep were collected and put into a yard by themselves by the parties, and the vendor was told by the vendee if he would keep them till Saturday of the same week, he would come then and get them and pay all bills. This was, in effect, agreed to by the reply made, and the plaintiff has in his account charged for the keep of the sheep for the two days.

The county court might then have well inferred that the relation of the parties was changed from vendor and vendee, to that of bailor and bailee, and that consequently the vendee had, in effect, both accepted and received the property in the language of the exception in the statute. The plaintiff, by agreeing to keep the sheep upon hire, as the bailee of the vendee, waived his lien upon them for the price, and they were exclusively under the dominion of the vendee. The possession of the sheep after this, by the vendor, was in the character of an agent or servant of the defendant.

Here can be no ground for the defendant to claim a rescision of the contract. Without considering the other point in the case, we think the judgment should be affirmed.

GEORGE W. CARR v. E. & T. FAIRBANKS & Co., *Trustees of*
JOHN BRUSAT.

Trustee process.

If a person summoned as trustee is not, when summoned, indebted to the principal defendant in a sum exceeding ten dollars, and does not subsequently, before making his disclosure, become indebted to him to that amount, he cannot be charged as trustee, though there may have been, during that time, mutual dealings between them, upon which the indebtedness of the trustee would have exceeded ten dollars if he had made no payments after being summoned.

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TRUSTEE PROCESS. It appeared, from the disclosure of the trustees that, at the time of the service of the writ upon them, they owed the principal defendant \$1.45; that the principal defendant and his minor son had subsequently worked for them, and that their work amounted to over \$50.00; that a day or two after being summoned as trustees, they advanced to the principal defendant \$24.21 in cash, and had sold him goods from their store, at different times, to the amount of \$41.66. On comparing the days when the principal defendant worked with the dates of the charges of the goods to him, it appeared that the trustees were never, at any time during that period, indebted to him to the amount of ten dollars. Upon the disclosure, the county court, December Term, 1855,—POLAND, J., presiding,—adjudged that the trustees were not liable, and that they be discharged with their costs.

Exceptions by the plaintiff.

S. W. Slade for the plaintiff.

A person summoned as trustee is liable for all then in his hands, and for all that may thereafter come into his hands before disclosure; and his liability for what thus comes into his hands is not affected by the fact that he could not have been adjudged liable for it at the time of his summons; *Newell v. Ferris & Tr.*, 16 Vt. 135; *Hurlburt v. Hicks & Tr.*, 17 Vt. 193; *Weller v. Weller & Tr.*, 18 Vt. 55; *Spring v. Ayer & Tr.*, 23 Vt. 516; *Seymour v. Cooper & Tr.*, 25 Vt. 141; Comp. Stat. chap. 32, § 2.

The trustee, when the process is served, becomes the depository of any and all goods, effects and credits of the debtor, which he then has, and all which may come into his hands up to the time he makes his disclosure. All effects and all credits, as they come to his hands, are to be kept on foot, and are confined and fastened there until the law determines to whom they shall go; *Lyman et al. v. Orr & Tr.*, 26 Vt. 119.

The statute protects a trustee by giving him a lien on the effects or credits in his hands, to the extent of any debt due to him from the debtor before the process was served, and allows him to deduct its amount and pay the balance only. But, after service of the process, if he sees fit to trust the debtor, he does so at his own risk, and cannot hold the funds for such a debt, because the plain-

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tiff in the trustee process has obtained a prior lien by his attachment of the funds which he holds to respond his judgment. Any transaction by a trustee, after service of the process, which operates as a payment, or is intended to divert the funds secured by the attachment, or which is designed to render the creditor's lien less beneficial to him, is a fraud upon the creditor and upon the statute.

If there was any probability that this process would operate as a hardship, or to the disadvantage of the trustees, they should have availed themselves of the provisions of the statute, enacted for the relief of trustees, in cases where injuries to them would be likely to ensue between the service of the process and the return day. Comp. Stat. chap. 32, § 75.

P. H. White for the trustees.

It appears from the disclosure, that neither at the time of serving process, nor at any time thereafter up to the day of disclosure, were the trustees indebted to the principal debtor in a sum exceeding ten dollars. They are, therefore, entitled to be discharged, by virtue of the Comp. Stat. chap. 32, § 72.

A person summoned as trustee may lawfully pay the principal debtor if the debt is so small that the trustee would be discharged on disclosure. The trustee is under no obligation to withhold payment on account of the possibility that the debt may be sufficiently increased to make him chargeable.

The principle for which the plaintiff contends would prohibit all dealings between the trustee and the debtor, except such as are for the benefit of the creditor. Not so are the authorities. *Seymour v. Cooper*, 25 Vt. 141; *Worthington v. Jones & Tr.*, 23 Vt. 546.

Sections 75, 76 and 77 of the Compiled Statutes, chap. 52, were not designed for cases like this, but for the accommodation of the trustee, in all cases where it would be inconvenient for him to attend at the return day.

The opinion of the court was delivered by

BENNETT, J. The only question in this case concerns the trustees. The statute enacts that "if the goods, effects and credits, in the hands of the trustee, shall not exceed in value the sum of ten dollars, the trustee shall be discharged, and shall recover his costs."

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We learn from the disclosure, that neither at the time this process was served, nor at any one time since, up to the time of the disclosure, were the trustees indebted to the principal debtor in a sum exceeding ten dollars.

The effect of the statute is to prevent the trustee process from attaching, where the indebtedness does not exceed ten dollars; and if the indebtedness at no time exceeded ten dollars, there was no time in which the attachment was operative. If the attachment could not be made *operative* at any one time, we cannot see how the trustees can be made chargeable, although if they had made no payments, their indebtedness, subsequent to the service of the trustee process, might have exceeded ten dollars.

Judgment of the county court affirmed with costs.

THE TOWN OF LYNDON v. THE TOWN OF DANVILLE, *Apl.**Settlement of alien born paupers.*

An alien born does not have the settlement in this state which his father once had, if, before his birth, the father removed into the foreign jurisdiction where the child was born and never afterwards returned from it.

APPEAL from an order of removal of Israel Chamberlin, a pauper, from the town of Lyndon to the town of Danville. Plea, that the town of Danville was not the place of the pauper's legal settlement. Trial by the court, June Term, 1854,—POLAND, J., presiding,—upon the following case stated.

Ralph Chamberlin, the father of the pauper, was born in Danville, February 27, 1800, and, with his father Caleb Chamberlin, had a legal settlement in that town.

He married Lydia Beebee, at Danville, about the year 1822, and some two years subsequently, removed to Stanstead, in the province of Canada East, where the pauper was born, in the year 1826. When five or six years of age, the pauper was brought by his mother to Lyndon, Vt., and left with the family of a Mr. Ber-

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niss. The mother did not return to Canada, but remained mostly in Danville; and, about the year 1850, married her present husband, Mr. Northrup. The pauper's father continued to reside in Stanstead until his death, which occurred about the year 1844. The pauper had no legal settlement in Lyndon. He continued to reside there until 1851, when he removed to Burke, remained there one year, then returned to Lyndon and continued to reside there until his removal in September, 1853.

Upon the foregoing facts, the county court decided that the pauper had a legal settlement in the town of Danville, and was therefore duly removed, to which the said town of Danville excepted.

T. Howard for the appellants.

The father and grand-father of the pauper had a legal settlement in Danville. If the father had continued to reside in Danville and the pauper born there, or perhaps if born in Canada, he would have had a settlement by derivation from his father. The father, Ralph Chamberlin, having removed from Danville to Stanstead in Canada, about the year 1824, the pauper was born there in 1826. The event shows that the father removed to Canada with the intent to remain, as he continued to reside in Stanstead until his death some 20 years after. He therefore expatriated himself so far as it was possible for him to do so.

We deny that the son Israel took, at his birth, the settlement his father formerly had in Danville. Such a doctrine involves the proposition that our pauper laws have an extra-territorial operation, not only beyond the state, but beyond the United States; and this, too, when all the parties are without our jurisdiction, the father an alien by expatriation, and the son by birth; such a proposition is opposed to all analogy and all sound principle.

But it is urged that the father having once had a settlement in Danville, that settlement continued until displaced by a settlement gained in some other town in Vermont, and that our courts take no notice of a settlement acquired abroad, as decided in *Georgia v. Grand Isle*, 1 Vt. 464. We do not controvert the doctrine of that case, and perhaps it may be reasonably extended to a settlement in Stanstead or Cuba. A legitimate consequence would be that if

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Ralph Chamberlin had returned after any length of time into Vermont, he would have been rehabilitated to his former settlement in Danville, and might have been removed thither from any other town. This was precisely the point in the case alluded to. It does not appear, however, that the pauper, in that case, had any family; so nothing is determined in respect to the effect upon his wife or children. There is no doubt the same consequence would result to any child born in Danville before they removed to Stanstead, for the doctrine of *continuando*, is equally applicable to original and derivative settlements. But the case at bar differs very materially from the one referred to. Ralph Chamberlin was fully and completely an alien before and at the time of the birth of the pauper; and if this was not so, the very fact that the pauper was born in a foreign government renders him an alien. If, then, this pauper was an alien, could he, and did he succeed to a settlement in Danville, which his father derived from his grand-father?—to a settlement which his father had removed from, and abandoned long before the pauper was born? We insist the father had no such right or benefit to impart to his son; and if he had the right in himself, he certainly had not the power, and neither had our laws the power to impart such right upon one born an alien.

The supreme court of Virginia has decided "that persons born in a foreign country, of parents also born in foreign countries, are not citizens of Virginia, and consequently cannot inherit lands there, although their grand-mother was a native of Virginia, and removed to England before the revolution, married there, and resided in that country until after the peace, when she returned to Virginia and resided until she died." This is carrying the principle one step further than is asked in this case. United States Digest, Vol. 1, p 134.

An alien cannot, by residence, gain a settlement in this state. Our laws regulating the settlement of paupers, are statutory regulations. They apply to our own state and her paupers, and have no such extraordinary energy and power that they can, and do transmit a settlement, derived from a grand-father, through an alien father, upon an alien son.

E. A. Cahoon for the appellees.

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Was the pauper, Israel Chamberlin, lawfully removed from Lyndon to Danville?

The pauper had no legal settlement in Lyndon or elsewhere, in his own right; hence he must derive one first from his father, if the father had one in this state. Had his father, Ralph Chamberlin, a settlement in this state? The facts stated, show he had. Therefore the pauper, by the plain and express terms of the statute, was rightfully removed, no matter what may have been the place or circumstances of the pauper's birth, so long as he was legitimate; or where may have been the residence of his father, so long as he gained no other settlement in the state, excepting the one in Danville.

But it is claimed that the pauper, having been born in a foreign jurisdiction, is not a citizen, and therefore can have no settlement in Vermont. Our statute distinctly repudiates such a doctrine. There is no exception where birth occurs in another state or government. Would this be urged against the pauper, had he been born in New Hampshire? Certainly not; and yet it might be done with the same reason as when born in Canada. The laws of pauperism are one thing, and the laws of citizenship or naturalization quite another; they have no connection. The former belong exclusively to the states, and are purely matters of internal police, while the latter are made and regulated by the Federal Government for the union. There are various modes by which persons may acquire legal settlements without reference to citizenship, as by vote of towns admitting one to be an inhabitant; holding for two years certain town offices; having a certain amount of grand list, &c.

But it is not true that the pauper was not a citizen of the United States. He *was* a citizen. By the 4th section of act of congress, passed April 14th, 1802, it is declared, "the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States, provided the right of citizenship shall not descend to persons whose fathers have never resided within the United States;" 2 Kent p. 52.

The pauper's father, being two years of age at the time of the passage of the above act, was of course then a citizen of the Uni-

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ted States ; for children, or minors, like women, are citizens, both by common law and by acts of congress, though they are not voters. His child, therefore, though born in Canada, was also a citizen of the United States by virtue of the foregoing act of congress.

Even had his father expatriated himself and sworn allegiance to a foreign power, (and it is yet doubtful if he can do this without the consent of this government, which does not appear,) it would not vary the case in the least. The act makes no exceptions for such contingency.

The opinion of the court was delivered, at the circuit session in September, by

REDFIELD, CH. J. The majority of the judges of the court, all of whom have heard the case, concur in the opinion that an alien born, whose father never comes into the state after the birth of the pauper, does not derive any settlement from his father, although his father, when he left the state, had a settlement in the state. The question is not of any practical importance, the number of cases which it will reach being very few. But if I were to determine it myself, I should give the statute the same operation it has in other cases, and the same which its words imply ; *i. e.* that legitimate children shall have the settlement of their father. Whether this should be extended indefinitely is perhaps questionable. Whether settlements could be derived through aliens who never resided in the state, it is not relevant to inquire. But here the pauper is himself a citizen by the act of 1802, having been born of parents who were citizens before the passing of that act, and he derives his settlement from a father who was born within the state. I think, therefore, that he was properly removed to the settlement of his father. If not, the question might arise, whether he could take the settlement of his mother, she having returned into the state about the time the pauper returned. And embarrassing questions might arise in that view, but the conclusion is that the judgment is reversed, and judgment upon the case stated that the pauper was unduly removed.

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The following opinions in this case have been furnished to the reporter by judges ISHAM and BENNETT.

ISHAM, J. The inquiry, in this case, arises, whether the pauper, Israel Chamberlin, had his legal settlement in Danville to which place he was removed by the order of two justices from the town of Lyndon. The Comp. Stat. 128, §1, provides, "that legitimate children shall follow and have the settlement of their father, until they gain a settlement of their own." Upon this provision of the statute this order of removal was made.

Ralph Chamberlin, the father of the pauper, had a legal settlement in Danville. It is not pretended that he or the pauper has ever acquired, in their own right, or in any other manner, a legal settlement in any other town in this state. If the case rested upon those facts alone, it would fall within the express letter of the act; the pauper would have a derivative settlement in Danville from his father, and the order of removal would have been properly made. It appears in the case, however, that Ralph Chamberlin with his family removed from Danville to Stanstead, in the province of Canada, about the year 1824: that the pauper was born in that province, and that his father continued to reside there until his decease in 1844. His removal to Canada was not a mere change of domicile with the intention of returning, but a permanent change of his residence from this to a foreign government. So far as he was capable of doing it, it was a renunciation of his duties, obligations, and allegiance to this state and this country. It is unnecessary, in this case, to inquire what relation, after his removal, existed between him and this country, or the government to which he had removed. It may be true, that if at any subsequent time he had returned to this state, his settlement would have continued in Danville, as his relation to the state would have revived and existed the same as if no removal had been made. In that event, his settlement might have been transmitted to his minor children residing with him. But however that may be, the question still remains, can this pauper, under our statute, have a derivative settlement from his father in Danville when his birth was in a foreign country, when his parents were residing there at the time with no intention of returning, and when, too, the residence of the father was continued in that province until his decease.

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The intention of the legislature, in the passage of the act in relation to the settlement of paupers, was to make provision for the support of the poor who are inhabitants of and who belong to the state. It is a local regulation, and has no effect except upon those between whom and the state there is that relation which necessarily exists between the state and those subject to its government. Foreigners and the inhabitants of other states, who have never had a settlement here, cannot claim the benefit of its provisions, as they owe no duty to the state and the corresponding duty of protection and support is not due from the state to them. The provisions of this statute should be so construed as to meet the ordinary wants of those for whose benefit they were made, and should be extended to no other cases. In the case of *Georgia v. Grand Isle*, 1 Vt. 464, it was held that a settlement once obtained in this state was not lost by the subsequent acquisition of a settlement in another state; and such seems to be the rule in New Hampshire. The minor children of such parents would follow the settlement of their father, though born in another state, if during their minority the father removed into this state. For, in the language of Lord Cranworth on the subject of derivative settlements in the case of *Adamson v. Barbour*, 28 Law & Eq. 39, "when we ascertain in what soil the root is fixed, we have at once the soil with which the branches are connected." That result, Judge Swift also remarks, 2 Swift's Dig. 818, "would seem to follow from the community of privileges between citizens of the several states." There is no disposition to question the doctrine as held in the case of *Georgia v. Grand Isle*, but the rule should not be applied to cases of this character. Such a contingency could not have been anticipated by the legislature, and such a construction would contravene the general policy of the general act. Ralph Chamberlin could not be regarded as a citizen, or an inhabitant of this state, or of the United States, at the time of the birth of this pauper, nor at any period of his life after his removal to the province of Canada. It is true a temporary absence will not divest one of the character of a citizen of the state to which he belongs; but when one removes to a foreign country, settles himself there; and engages himself in the trade and business of that country, the *animus manendi* is fully established; and when that fact exists, he is stamped with the national character of that

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country, and his rights as a citizen of this country are at least suspended during that period. The rule seems to follow from adjudged cases in the courts of the United States; 2 Cranch 120; *Case v. Clarke*, 5 Mason 70; *Cooper v. Gilbrath*. 3 Wash. C. C. 546. It cannot be regarded as an unreasonable construction of this act to say, that if the rights of the father of this pauper, as a citizen of this state and country, were lost or suspended by his removal and residence in Canada, his right to transmit a derivative settlement to his children during that period was lost or suspended also.

The pauper, during his life, could be regarded only as an alien, and subject to all the incapacities of one. He was under no natural allegiance to this country, and the correlative duty of protection was not due from this country to him, except such as is due to all aliens during the time they are within its jurisdiction. Justice Blackstone, 1 Bl. Com. 394, observes that "children of aliens, born in England, are, generally speaking, natural born subjects, and are entitled to all the privileges of such." Judge Swift, 2 Swift's Dig. 618, says that "by the common law, the children of private citizens born abroad are aliens." Chancellor Kent has remarked, 2 Kent's Com. 1, that "that is the rule of the common law without any regard or reference to the political condition or allegiance of their parents, with the exception of ambassadors." In the case of *Lynch v. Clark*, 1 Sandf. Ch. R. 584, 639, it was held that a person born in New York of alien parents, during their temporary sojourn there, and who returned while an infant with her parents to their native country, and always resided there afterwards, was a citizen of the United States by birth. The doctrine of that case Chancellor Kent observes, "is that of the English common law, and was the law of the colonies, and became the law of each and all the states when the declaration of independance was made, and continued so until the establishment of the constitution of the United States, when the whole exclusive jurisdiction of the subject of citizenship passed to the United States, and the same principle has there remained." If the infant in that case was a citizen of this country by birth on a mere temporary sojourn of her parents here, surely the pauper, in this case, must be regarded as an alien, and a subject of the province of Canada, without reference to the citizenship of his father.

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The question as to the citizenship of this pauper is unaffected by the act of congress, passed April 14, 1802, which provided that "the children of persons who now are, or have been citizens of the United States shall, though born out of the limits and jurisdiction of the same, be considered as citizens thereof." That act is retrospective in its character, and has no effect on children born subsequent to its passage. 2 Kent's Com. 14. 2 Swift's Dig. 818. Neither is it affected by the act of congress of February 18, 1855, as that act was passed after the decease of the pauper, which occurred during the winter of 1853-4, as well as after the decease of the pauper's father; and the act itself applies only to those persons whose parents were citizens of the United States at the time of their birth. The pauper was therefore an alien at the time of his birth, and remained so to the time of his decease, and was as incapable of having a derivative settlement in this state from his father, as he was incapable of obtaining a settlement by residence. If this pauper derived a settlement in that manner in Danville, then, upon the same principle, his children, if he left any, would derive a similar settlement, though he had lived and his children were born in Canada, and that right of derivative settlement in Danville would be transmitted from generation to generation among those who are aliens, and who are under a natural allegiance to other governments. There is no place where such a consequence can be arrested when that construction of the act is applied to a case of this character. Such consequences could never have been intended by the legislature in making provision for the poor of this state, and such construction is deemed unwarranted by the letter or spirit of the act. I think, therefore, the pauper was unduly removed, and, upon the facts in the case as agreed upon by the parties, the judgment of the county court should be reversed, and judgment rendered for the defendant.

BENNETT, J. It is hardly necessary that I should add anything in this case; but it appears to me to extend the statute which enacts that "legitimate children shall follow and have the settlement of their father until they gain a settlement of their own," to a case like the present, would be to extend it to all possible cases indefi-

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nately, and if this pauper took a derivative settlement in Danville from his father, I see not why the alien born children of this pauper might not claim through him a settlement in Danville also.

It appears to me that it is going far enough to hold that a child born in another sister state of a father having at the time his domicile in such state, shall take the settlement of his father in this state, if he have one. This may arise from the community of privileges between citizens of the several states, but if the father had been a foreigner, the place of birth of the child would have been its place of settlement.

In the case now before us the pauper was born an alien to all intents and purposes. He could claim no personal rights or privileges at the hands of the state or the general government, and he owed to neither government any duties growing out of an allegiance. The father removed from this state about the year 1824, and lived in Canada up to the time of his death in 1844, having in that government a fixed residence, and without any intention of returning to the States, and during that time the pauper in question was born. I do not apprehend it is necessary to decide what the effect of this removal of the father from this state to Canada, under the facts which attend this case, would have upon his own settlement. It might if it was necessary, to say the least, be claimed with great plausibility that a citizen might in good faith adjure his country, and that the assent of his government would be presumed, if there was no statute regulation upon the subject, and that he should be deemed thereby to be denationalized.

Our naturalization laws all seem to be founded upon that basis, and it might well be inquired whether this is not to be treated, at the present day, as the practical and fundamental American doctrine on this subject. I should apprehend that if the father was to be treated as denationalized, it would follow that there was on his part a perpetual abandonment of his previous settlement in the town of Danville, and of all his rights and privileges as an American citizen, and that it could not be maintained that upon his subsequent return to this state, his settlement in Danville would be revived. But we are not called upon to consider what would have been the effect, if any, of the father's return to this state,

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upon his own settlement, or upon that of the pauper. It is a common principle that a foreign parent cannot communicate a settlement to a child, and I am, at all events, satisfied to treat the father in this case as *quasi* a foreign parent, and that he did not and could not communicate a settlement in this state to this child born an alien.

This, as it seems to me, accords with a sound construction of the statute. When the statute says the child shall have the settlement of the father until he gains a settlement of his own, it would seem to me not to be the intention to include alien born children, who could not gain a settlement by a residence in a town, and I have some doubt whether aliens should be considered as included in the general terms "every person," and "any person," in those sections of the statute which provides for the gaining of a settlement by other means.

Although the views of all the members of the court are not the same in relation to this case, yet I think the defendant town is entitled to a judgment, that the pauper was unduly removed.

JOHN DOOLITTLE, LUCIUS DOOLITTLE, JOHN MARSH AND
FANNY MARSH, *his wife*, v. BELA HOLTON.

License to administrator to sell real estate. Presumptions.

Circumstances under and from which the granting, by the probate court, of an order or license to an administrator to sell real estate, and the regularity of the proceedings of the probate court, and of the administrator, in reference thereto, may be presumed, in the absence of any original or record evidence respecting it.

EJECTMENT for lands in Lyndon which were set out to the widow of Jesse Doolittle, as her dower in his estate, on the 11th of October, 1809. It appeared that the widow, Eunice Doolittle, died in 1848, and the plaintiffs claimed the reversion as heirs of the said Jesse Doolittle. The defendant claimed under a deed from

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Nathaniel Jenks, administrator *de bonis non* upon the estate of the said Jesse, to Oliver Doolittle, dated April 30th, 1810, which purported to convey, with other lands, the reversion of the widow's dower. At the same date the widow, it appeared, conveyed her interest in the premises to the said Oliver Doolittle, from whom there was a regular chain of conveyances to the defendant. The rights of the parties depended upon the validity of the administrator's deed, above referred to, which the plaintiffs claimed was invalid, for want of a previous license. The cause was tried by jury, in the county court, at the June Term, 1854,—PECK, J., presiding.

It appeared that Jesse Doolittle died intestate in 1807, and that administration upon his estate was granted, during that year, to Riverius Burt, who, on the 19th of February, 1808, was licensed to sell the real estate of the intestate, but on the 11th of October, 1809, he resigned, and was discharged as administrator, without having sold the real estate; and on the same day Nathaniel Jenks was appointed administrator *de bonis non*, who afterwards, on the 30th of April, 1810, sold and deeded the two-thirds of the home farm, which was not set off to the widow, together with the reversion of the other third, (being the premises sued for,) to Oliver Doolittle, and on the 20th of the following November, made a return of said sale to the probate court, which was received by that court and ordered to be recorded. From the inventory of the estate which was returned to the probate court, and the report of the commissioners, it appeared that the claims allowed exceeded the value of the personal property appraised; and the testimony on the part of the defendant showed that Oliver Doolittle and the successive grantees under him, had been in the continued occupation of all the premises described in his deed, since its date, claiming title under it; and that at the period of time embraced in the settlement of said estate and before, and also for some time after, the proceedings in the probate court where this estate was settled, were kept very loose,—and that in many cases of sales of real estate during that period, which were, in fact, made under proper orders, the orders of sale were not recorded, nor were any proper entries made by said court in relation to them.

The plaintiffs insisted, and requested the court so to charge, that

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no title to the premises was conveyed by the deed of Nathaniel Jenks, as administrator, because there was no license to said Jenks to sell, and he could not legally act under the license of the first administrator, and no proof of any necessity for the sale, and no proof of any bond given by Jenks to account for the proceeds of such a sale. The court declined so to charge, but told the jury that it was necessary, in order to render the said administrator's deed valid and operative to convey any title, that they should find, from the evidence, that an order to sell the real estate in question, including the widow's dower, was, in fact, regularly made by the probate court, after adjudging it necessary, previous to the sale and date of the deed, and that the sale was made and deed executed by the administrator, in pursuance of such order, and in conformity with it; and also find that such order of sale was granted to Nathaniel Jenks, after his appointment as administrator,—and that he had no power to sell under an order or license granted to the former administrator. The court alluded to, and commented upon the evidence in the case relative to the question whether such facts existed as would authorize the probate court to grant license to sell the real estate in question, and, upon the question whether, in fact, the probate court regularly made such order, or granted such license,—and upon the question whether the administrator regularly proceeded under it;—and told the jury that these were questions of fact, for them to find from the evidence in the case;—and that it was for them to say whether the evidence was sufficient or not; and, in commenting upon the evidence, the court told the jury that, inasmuch as the plaintiffs had no right of action till 1848, to recover the premises in question, on account of the widow's life estate, the mere lapse of time, even coupled with the fact that the defendant, and those under whom he claimed, under the administrator's deed, had been in possession for many years, would raise no presumption against the plaintiffs, nor furnish any evidence of the facts necessary to give validity to the administrator's deed, if no other lands, except such as were covered by the widow's dower, had been included in the sale and administrator's deed; but that, as it appeared that other lands of the estate, not covered by the widow's dower, were included in the administrator's deed, and that such other lands had been held and possessed under

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the same deed from the administrator, adversely to the heirs, and without any claim on the part of the heirs, for so great a length of time, it was evidence tending to raise a presumption in favor of the validity and regularity of the proceedings in the probate court, and the sale by the administrator;—and that this evidence might be weighed by the jury with the other evidence in the case, although no order or license of sale by the probate court, to Jenks, appeared in the records or proceedings of that court; and the court also told the jury that it was claimed by the plaintiffs' counsel that, as there was an order of sale to Burt, the former administrator, and no order to be found to Jenks, the presumption was, that Jenks acted under such former order, and that this furnished some ground for such presumption,—and that, if they found that this presumption was warranted, when taken in connection with the whole evidence on the point, their verdict should be for the plaintiffs; that on the one hand, it was not necessary for the defendant to prove the facts necessary to give validity to the deed of the administrator, by positive and direct testimony, after such lapse of time;—but, on the other hand, it was not enough for the defendant to prove such facts as barely rendered it possible that such facts existed, and such proceedings were had, as would render the administrator's deed valid; but he must go further, and prove such facts and circumstances as were so far inconsistent with the idea that the sale was irregular, and void, as to warrant the jury in finding it proved that such facts existed, and that such proceedings were actually had in the probate court, as were necessary to render the administrator's sale regular and valid.

To the refusal to charge as requested, and to the charge as given, the plaintiff excepted. Verdict for the defendant.

G. C. Cahoon for the plaintiffs.

————— for the defendant.

The opinion of the court was delivered, at the circuit session in September, by

REDFIELD, CH. J. This case has been a good deal examined by the court at the former hearings. The only difficulty which

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seemed ever to exist, as matter of fact, in regard to the regularity of the administrator's sale, was as to the license in fact being issued to the administrator *de bonis non*. One appearing of record to the first administrator, and none to the second, raises a very natural doubt whether the sale was not, in fact, made upon the former license. The necessity of some sale of real estate seems to have been apparent, from the debts exceeding the amount of the personalty. The probate court did order a sale of the real estate, *i. e.*, the farm in question, in general terms. This would be a sufficient ground from which to presume the necessity of the sale. Indeed, after such an order, and the actual sale, we should scarcely allow an inquiry into the foundation of such an order. That being a matter within the exclusive jurisdiction of the probate court, unless the order showed, upon its face, that it was made for some other purpose than the payment of debts, or when other means sufficient existed, we should, I think, not allow the jurisdiction to be defeated, by proof out of the record. And all deficiencies in the recitals of the order will be supplied by intendment.

And, as it was competent for the court of probate to sell the whole real estate, the same being difficult of division, if they deemed it expedient or conducive to the interest of the estate, a general order of sale of this real estate being made, and the whole being sold, it should be, perhaps, presumed that the sale proceeded upon such judgment and discretion of the probate court, or, upon the necessity of selling the whole for some sufficient reason.

If a license to sell be shown, it will be presumed to have been upon sufficient previous notice, and the other preliminary proceedings to have been regular, the bond and oath of office, &c., as in other cases. The presumption, *omnia rite acta*, applies with especial force to the proceedings of courts of probate. And, after so great a lapse of time, although we cannot make any presumption against the plaintiffs, on the ground of possession merely, we certainly should be at liberty to take into account the enhanced difficulty of showing the true state of the facts, as they existed at the time, and the imperfect manner in which the business is known to have been transacted, at that early day, and the probability that if such an order had existed, it might not have been recorded or preserved, and the extreme improbability that if such an order had

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existed, and had not been recorded or preserved, that its existence could now be shown.

No part of the evidence admitted in the trial in the county court is specially objected to. It is said it is slight, circumstantial and fanciful, in general terms. But when we come to examine it in detail, and to look into the charge of the court, it seems to us the trial was managed with very considerable care and circumspection. It may be true that the jury have found the fact of a license to Jenks upon very slight grounds, and that the rules for weighing the evidence given to the jury are calculated to make the most of it. We think that is so, and we think it commendable, both in the court and jury. It is certainly very much to be regretted, that after such a lapse of time, when there is every reason to believe that the administrator accounted for the avails of the whole sale, and thus the price of the land came, very obviously, to the use of the heirs, that any technical defect in proceedings should defeat the title, and bring loss and ruin upon those who have trusted to the regularity of these judicial sales.

We could not, we think, suggest any improvement in the mode in which the county court have carried out the purpose of this court, in granting the new trial;* and, the result is certainly one which might have been, and perhaps ought to have been expected.

Judgment affirmed.

* See same case, 26 Vt. 588.

JAMES MORSE v. TIMOTHY WEYMOUTH.

Trespass in repairing highway. Construction of deed. Submitting it to the jury.

The defendant, for the purpose of widening a side-hill highway upon the plaintiff's land, drew stone and dumped them on the lower side of the road so that some of them rolled down against and through the plaintiff's fence into his field. The widening of the road was necessary, and was done in a proper and reasonable

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manner, with the approval of the highway surveyor. *Held*, that the defendant was not liable to the plaintiff in an action of trespass for so doing.

The construction of a deed should not be submitted to the decision of the jury without limitation or restriction, or specific instruction in reference to it. But if it is, and they give it a correct construction, a new trial will not be granted.

A deed of "a part of lot No. 17," "laying in the N. E. corner of said lot, and is that part of said lot which lays on the north side of the road," and an exception in a deed of lot No. 17 to another person, of the same date, of that part of it "which lays on the north side of the road at the N. E. corner of said lot, estimated at about three-fourths of an acre," construed as conveying and excepting not only the north-east corner piece but also a small strip on the north-easterly side of a road running from the south-east to the north-west over said lot but separated from the N. E. corner piece by a curve in the road, which run for a short distance upon the easterly line of the lot.

TRESPASS ON THE FREEHOLD. Plea, the general issue; trial by jury, June Term, 1855,—POLAND, J., presiding.

The plaintiff gave evidence tending to show that in the summer of 1853, the defendant drew several loads of small stone from his fields upon the highway running through the plaintiff's farm, and where it run along upon a side-hill, and turned them off the lower side of the road; and that some of the stone rolled down against the plaintiff's fence, and some rolled through the fence into his fields,—and that some of them were piled or thrown off opposite. and obstructed a bar-way to the fields, and that the plaintiff was compelled to remove them.

The defendant's evidence tended to prove that the highway at this point was very narrow and unsafe, and that it was necessary and proper to make said road wider, and that the piling of small stones upon the lower side of the road was a proper mode of widening and repairing the same; that after the defendant had drawn and placed two loads of stone, he applied to the surveyor of the district, who approved of what had been done, and told him he might draw more stone and place there, but, as the taxes were all expended, he must do it without charge to the district; and that after this the defendant drew four or five loads more and placed them on the lower margin of the road;—and that, in a few days after this, the selectmen of Waterford ordered a sum of money to be laid out on the road at this same point, in widening it further, and in covering up the stone the defendant had placed there with earth, and that but very few stones rolled down against the plain-

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tiff's fence, and that no damage was done thereby, and that the bar-way was obstructed by what was done by the selectmen, and not by him.

The court charged the jury that, if the road was unsafe at this point, by reason of its being narrow, with a declivity on the lower side, and the placing of the stones there was a proper method of repairing the road, and was done by the defendant for that purpose, and in a proper and reasonable manner, and was approved by the highway surveyor or selectmen, that the defendant would not be liable to the plaintiff; and that for the two loads of stone placed there before any application to the surveyor, if they were placed there properly for the necessary repair of the road, the defendant would not be liable, if it was subsequently approved of by the surveyor.

The plaintiff read in evidence a deed from George Alexander to himself, dated February 25, 1841, of lot No. 4 in the 7th range and lot No. 17 in the 6th range, "except that part of said lot No. 17 which lays on the north side of the road at the north-east corner of said lot, estimated at about three-fourths of an acre." The defendant also read in evidence a deed from the said George Alexander to himself, dated the same 25th of February, 1841, of "a part of lot No. 17," * * "laying in the north-east corner of said lot, and is that part of said lot which lays on the north side of the road." Both parties introduced plans of their farms, which adjoined each other, showing the relative location of said land, and the location of the highway, and of that portion of lot No. 17 which lay upon the north or east side of the highway in question, both which plans were referred to by the bill of exceptions. The plaintiff proved that near the southern termination of that part of lot No. 17 lying on the easterly side of said highway, the defendant had cut and cleared away some small trees and brush, partly between the travelled path of the road and the defendant's fence, and partly in the defendant's fields, as enclosed by his fence,—and claimed that the portion of lot No. 17 deeded by Alexander to the defendant did not include the strip upon which said trees were cut, but was restricted to the triangular portion directly at the north-east corner of the lot. The court submitted it to the jury to determine from the language of the deeds, and the condition and location of the land, what was

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intended to be conveyed,—whether only the triangular portion in the north-east corner, or that and the strip below, upon that side of the road, upon which the trees were cut. The jury returned a verdict for the defendant. Exceptions by the plaintiff.

From the plan which came into the hands of the reporter it appeared that the course of the east line of lot No. 17 was N. 23 deg. W., and that the highway from the east struck said east line between fifty and sixty rods southerly from the north-east corner of the lot, and thence run northerly on said east line, but bearing to the westerly so that it left it about sixteen rods north of the point where it first struck it, and continued to bear westerly for the distance of about ten rods further, and then curved easterly, so as to come in contact with the east line of the lot about five or six rods further north, and then run upon the line about four rods, and left it at a point about twenty rods south of said north-east corner, taking a more north-westerly course and striking the north line of the lot about fifteen rods west of said north-east corner. The north-east-corner of the lot cut off by the road contained about one hundred, and the piece in dispute not over from ten to twelve rods of ground, its greatest width not exceeding one rod, and tapering from that to a point about ten rods distant in one direction, and from five to six rods distant in the other. The defendant owned the land east of both pieces, which were about four rods apart, being separated from each other by the passing of the road over said east line as before mentioned.

————— for the plaintiff.

The court erred in submitting to the jury what was conveyed by the deed from Alexander to the defendant. The deed is definite in terms, and fully describes what was conveyed. *Exr. of Stevens v. Hollister*, 18 Vt. 294.

The defendant had no right to make any improvement upon the road unless by direction of the surveyor or selectmen. And the stone drawn and rolled down against the plaintiff's fence and into his field by the defendant, before being ordered by the surveyor or selectmen, was a trespass.

S. W. Slade for the defendant.

There can be no question, from the situation of the land con

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veyed, and from the language of the conveyances, but that the grantor as well as both these parties intended that the plaintiff should take by his deed the land upon the south side of the highway, and the defendant what was upon the north side of it, and that the highway should be the line between them. The identity of the land conveyed, and the actual extent of disputed boundaries, are always questions for the jury. *Hodges v. Strong*, 10 Vt. 247; *Preston v. Robinson & Ross*, 24 Vt. 583; 4 Greenleaf's Cruise on Real Property 242, note.

As to the repairs made by the defendant with the stones, the jury have found that the road at this point was unsafe, and that the stones were put there for the purpose of repairing it, and that the work was done in a proper and prudent manner. When an inhabitant of a town repairs a highway just as the town is in duty bound to do it, he should be regarded as acting in behalf of, and for the benefit of the town. But if the assent of the surveyor was necessary in order to justify the defendant in making these repairs, his subsequent ratification of the act is equivalent to a previous authority. It is well settled that an act performed for another by a person without any prior authority becomes the act of the principal if he subsequently approves and adopts it. He thereby confirms it and makes the act his own. *Culver v. Ashley*, 19 Pick. 300, 303; 1 American Leading Cases 569 and note 572-3-4; Story on Agency, § 242-244.

The opinion of the court was delivered, at the circuit session in September, by

REDFIELD, CH. J. I. The question made by the plaintiff in regard to the two loads of stone drawn by the defendant and placed upon the road before consulting the highway surveyor, as the jury were required to find that it was properly done, and done with a view to remedy a defect in the road, and was approved and adopted subsequently by the surveyor, it seems to us the transaction should be regarded in the same light as if it had been previously directed by the surveyor, and that there was no just ground for claiming damages of the defendant in an action of trespass, as if it were a mere tort; or, indeed, under the finding of the jury, for claiming damages at all.

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II. In regard to the construction of the deed being submitted to the jury without limitation or restriction, and without specific instruction, the jury being required merely to give it such a construction as they judged the parties intended, it was no doubt error. We have had occasion to speak upon this subject so frequently, and it is so obvious and so familiar a principle of the law, that it seems almost useless to use many words upon the subject. If the facts in regard to the relative location of the road and the lot were in dispute, or more properly, if there had been any question in regard to the north side of the road, as if the road had run due north and south at this point, it might have been a case of latent ambiguity, or, as some of the English cases denominate it, a case of equivocation, and it might have been proper, under proper evidence, to have submitted to the jury which side of the road was intended by the north side. But notwithstanding this error, if the jury took the correct view of the deed, there is no occasion for a new trial. For the case is this: the title of the whole lot being in George Alexander, he deeds to the plaintiff all except "that part of said lot which lies on the north side of the road, at the north-east corner of said lot, being about three-fourths of an acre,"—and to the defendant he deeds that part of the lot "lying in the north-east corner of the lot, being that part which lies on the north side of the road, three-fourths of an acre more or less." Both deeds bear the same date.

Now, it is obvious that the description is the same in effect in both deeds, and that there is nothing definite in the description, except its being on the different sides of the road. For the quantity is not fixed definitely in the deed to the defendant, and, if it were, it would not determine the locality. The part of the lot, too, defines nothing with certainty. But the side of the road is definite, a road having but two sides. And, if one is called north, it imports that which is more north than the other, that is, more north than south. That is easily discovered in this case, if the plan is reliable. And, as both plans are referred to in the case, we have used the one presented upon the trial, (having waited a long time for the other.) By this plan, the road at this point runs from north-west to south-east, one side being north-east and the other south-west. The side intended by the north side of the road, is, therefore, the north-

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east side, as the opposite side is opposed *in toto* to a northern direction. The quantity of land is not much affected whether the deed is made to include the piece nearest the corner of the lot only, as the other small fringe is almost connected with it, and is also upon the north side of the road. In either case, it is about three-quarters of an acre. The small fringe is not strictly in the north-east corner of the lot, but it is upon the north side of the road. And unless we say the deed to the defendant meant to include all the land upon the north side of the road, there is nothing definite about it. And, it seems to us, as the deed finally fixes upon that definition, and that is certain and unmistakable, it should govern. "And is that part of said lot which lies upon the north side of the road," &c. Even if it were necessary to qualify the other parts of the description, which are uncertain, as the quantity and the corner of the lot, as if the quantity should be two acres, and a portion of the land extend so far south as to be nearer the south-east corner of the lot than the north-east, still, as most of the land is in the north-east corner of the lot, and this little strip or fringe is all upon the north side of the road, if it were all connected there could be no question at all as to the proper construction of the deed. And we think the road crossing the line of the lot at a single point, for a short distance, should not vary the construction of the deed, and that it must be construed to convey all the land in that lot upon the north side of the road.

Both deeds bearing the same date affords something of a natural presumption that the intention probably might have been to deed that portion of the lot upon either side of the road, so as to leave the road for the division between the different owners.

The jury, therefore, without proper instructions, having adopted the proper construction of the deed, there is no occasion for a new trial.

Judgment affirmed.

INDEX.

ACCOUNT.

1. If promissory notes go into the hands of a bailiff or receiver under a contract, he may be called to an account respecting them in the common law action of account, and in some cases since the law of 1862, (Laws of 1862, p. 9,) in the action on book. *Woodward v. Harlow*, 838.

2. A recovery may be had for notes which were received by the defendant to be held as security, until the debt of the plaintiff should be settled, if it appear that there is, in fact, nothing due from the plaintiff to the defendant. *Id.*

3. If the defendant received them to account for after the payment of costs in a pending suit, the payment of the costs would not be a condition precedent to the plaintiff's right of action. *Id.*

See AMENDMENT 2.

ACTION.

1. An act legal in itself, and which violates no right, cannot be made actionable on account of the motive which induces it. *Chatfield v. Wilson*, 49.

2. No action on account of a public nuisance can be sustained by a person who has not sustained special damage from it. *Hatch v. Ft. Central R. Company*, 142.

3. A bailee of property, who has an interest in it, may maintain an action in his own name for any injury done to it, either tortwise, or by the breach of any obligation or duty which another may be under, in reference to it. *White et al. v. Bascom et al.*, 268.

4. By a contract between the plaintiffs, one of them was to furnish a boat, and the other take charge of running it for the purpose of transporting merchandise, the profits of which business were to be shared by them equally. *Held*, that, for an injury or breach of duty by a third person in reference to the boat, by which it was lost, an action might be maintained and the value of the boat recovered in the name of the plaintiffs jointly. *Id.*

5. The plaintiffs engaged the defendants to tow for them a boat containing merchandise which the plaintiffs were transporting as common carriers, and which was afterwards lost by the neglect and want of ordinary care of the defendants. *Held*, that the plaintiffs might recover the value of the merchandise lost, though they had not paid the owners, or received any pay for the transportation of it. *Id.*

6. A recovery may be had for notes which were received by the defendant to be held as security, until the debt of the plaintiff should be settled, if it appear that

there is, in fact, nothing due from the plaintiff to the defendant. *Woodward v. Harlow*, 838.

7. If the defendant received them to account for after the payment of costs in a pending suit, the payment of the costs would not be a condition precedent to the plaintiff's right of action. *Ib.*

8. An action pending, and on trial by a jury, on the 30th day of November, before a justice of the peace whose term of office expired on that day, was proceeded with, by the agreement of the parties, until 6 o'clock on the morning of the 1st of December, when the jury failed to agree; and the ex-justice took no further cognizance of the cause, and neither party caused a new justice to be substituted in his place. *Held*, that the defendant therein could not maintain an action against the plaintiff for the taxable costs to which he had been subjected in his defense of the suit. *Johnson v. Kingsbury et al*, 486.

9. If the purchaser of property, which is conveyed to him, promises but neglects to furnish security for the payment, at a future day, of that part of the purchase money which is unpaid, an action may immediately be commenced and maintained against him for its recovery. *Ascotney Bank et als. v. McK Ormsby*, 721.

10. In such an action the declaration should be special and count upon the promise to furnish security; and the rule of damages would be the sum to have been secured. *Ib.*

11. If the seller declines to make a transfer of the property until the security is furnished but the purchaser fraudulently obtains the possession of it, (or of the deed of it, if real estate, as in the present case,) the seller may waive the tort, and maintain an action on the promise to furnish security. *Ib.*

12. The defendant gave the plaintiff a written lease of certain premises, and before the expiration of it he deeded the same premises to a third person without making any reservation of the plaintiff's rights. *Held*, that the fact that the grantee had such notice of the plaintiff's rights as would enable the plaintiff to maintain them in a court of equity, constituted no defense and would not prevent the plaintiff from pursuing the defendant on his contract in an action at law. *Staples v. Flint*, 794.

See FRAUD 1; PRINCIPAL AND SURETY 1.

ADMINISTRATOR, See EXECUTORS AND ADMINISTRATORS.

ADVERSE POSSESSION, See POSSESSION.

AGENT.

1. If, in a simple contract made by an agent, the agent does not disclose his agency and name his principal, or, if he exceed his authority, he will render himself personally responsible. *Royce v. Allen*, 234.

2. The lessee of a railroad is an agent of the railroad corporation, within the meaning of the general railroad act, (Comp. Stat. chap. 26, § 41,) making the corporation and its agents liable for damages occasioned by want of fences and cattle guards. *Clement v. Canfield*, 302.

3. An expressed disapprobation of the acts of one who assumed to act as an agent will not prevent a subsequent ratification and adoption of them. *Woodward v. Harlow*, 838.

4. *Held*, that the facts and testimony in the present case did not show a case of agency on the part of the defendant. *Hodges & wife v Green*, 858.

5. The president of the defendants borrowed fifty dollars of the plaintiff for the defendants, to be expended on their buildings, with the understanding that it should be repaid to the plaintiff. The money was paid into the defendants' treasury and used for the purpose intended. *Held* that this receipt and expenditure of the money was a ratification, by the defendants, of the act of their president, and bound them to a re-payment of the money, even though the president exceeded his authority in borrowing it. *Lyman v. Norwich University*, 560.

ALIEN.

1. An alien born does not have the settlement in this state which his father once had, if, before his birth, the father removed into the foreign jurisdiction where the child was born and never afterwards returned from it. *Lyndon v. Danville*, 809.

AMENDMENT.

1. A declaration upon a promissory note may be amended by adding a count upon an account stated. No new cause of action is thereby introduced, if a recovery is claimed only upon the original consideration of the note. *Stephens v. Thompson et al.*, 77.

2. The declaration in an action of account cannot be amended, so as to introduce a new and distinct claim, after the coming in of the report of the auditors, unless the report is first set aside; and, if then amended, the defendant may plead *de novo*. *Joy v. Walker*, 442.

See SCIRE FACIAS i.

APPEAL.

1. No appeal lies from the report of the commissioners upon a deceased person's estate, that a contingent claim was presented. An appeal only lies from its allowance or disallowance. *Hobart v. Herrick*, 627.

2. A creditor of an estate has the right of appealing from the allowance of a claim in favor of another creditor when the administrator declines to do so. And such declinature would probably be inferred, if no claim of the administrator to prosecute the appeal in his own behalf should be interposed. *Id.*

3. Sufficiency and requirements of the bond to be given by the appealing creditor in such a case. *Id.*

4. An appeal lies from the decision of the probate court setting out a homestead to the widow of a deceased person. *True et als. v. Estate of Morrill*, 672.

5. A claimant of the effects in the hands of a person summoned as trustee in a suit before a justice can only appeal, if at all, in such cases as are appealable by the other parties. If, therefore, the action be upon a note for less than \$20, and the indebtedness of the trustee be upon a similar note, the claimant cannot appeal from a decision and judgment adverse to his claim. *Cabot v. Burnham's trustee & claimant*, 694.

6. The plaintiff in a trustee suit before a justice, the subject matter of which is appealable, may appeal from the judgment of the justice in reference to the liability

of the trustee, where the principal defendant is defaulted. *Van Buskirk v. Martin & Tr.*, 726.

See CHANCERY 8; EVIDENCE 19, 21; HIGHWAY 4, 5, 6; RECOGNIZANCE 1.

APPEARANCE, See PROCESS.

ARBITRATION.

1. Neither mistake or irregularity of conduct on the part of arbitrators, which does not affect the whole award, is a ground of defense to it, in an action at law. *Shepherd v. Briggs*, 81.

2. An award, which is operative as a final and conclusive adjustment of all matters between the parties, is not vitiated by an order requiring them to execute mutual releases. *Ib.*

3. An award defining a boundary will be defeated by proof that there was no such monuments as are referred to in the award, for the purpose of locating the boundary. *Giddings v. Hadaway*, 842

4. But a want of certainty in the award in this respect alone, will not affect another portion of the same award, determining that one party had trespassed upon the land of the other, and awarding to the latter party his damages and costs, though the trespass was upon the same land, to which the disputed boundary had reference. *Ib.*

5. Parties agreed to submit certain matters of difference to arbitrators who, after hearing and consultation, informed the parties they had agreed, but that neither party was to be bound by their determination, and would be under no obligation to abide by it, and then announced the conclusion to which they had arrived. *Held*, that their conclusion was merely advisory, and of no binding force as an award. *Sartwell v. Horton*, 870.

6. A bond of submission provided that the award of the arbitrators should be made and published "in writing under their hands and seals." *Held*, that the terms of the submission were complied with, and the submission became irrevocable when the arbitrators made such an award, which was ready to be delivered, and notified the recovering party of its contents. *Morse et al. v. Stoddard et al.*, 445.

7. *Held*, that a statement, in the bill of exceptions, "that the award was made," imported that it was made in conformity with the submission. *Ib.*

8. A general award is sufficient, where the claims submitted are pecuniary, or capable of being reduced to a definite sum, and the submission does not require or contemplate that the arbitrators should award the performance of any other act than the payment of money. *Bowman v. Downer*, 532.

9. In this case the submission required the arbitrators to decide as to the sufficiency of a tender made, and the right of a party to recover in a suit commenced by him, (to the recovering party in which the taxable costs were to be awarded,) and also to determine the liability of the other to account for certain rents, and their value. The arbitrators awarded generally, that one of the parties should pay a specified sum to the other, on demand, "in full of and for all matters submitted." The award *held* sufficient. *Ib.*

10. In this state, the costs of the prevailing party in an arbitration may be awarded in his favor, though there be no provision for it in the submission. *Ib.*

11. The revocation of a submission is a breach of an agreement or condition in an arbitration bond to abide by and perform the award. *Craftsbury v. Hill et al.* 763.

12. An arbitration note, or a note executed and placed in the hands of arbitrators, to be delivered to the other party if he should recover, becomes a valid obligation upon the making of a valid award in his favor, and the delivery of the note to him; and when so delivered, a recovery may be had upon it under the money counts. *Woodrow v. O'Conner*, 776.

13. It is no objection to an award that neither the arbitrators nor witnesses were sworn, if the law did not require it, or if the parties agreed that they need not be,—nor is it any objection that the umpire was appointed before the arbitrators entered upon the business submitted to them, or that the arbitrators joined with the umpire in making the award. *Ib.*

14. In an action for the recovery of the amount of an award or of an arbitration note, the award cannot be collaterally impeached by showing that the plaintiff procured it by means of false testimony, which was known by him to be so. *Ib.*

ASSETS.

1. The administrator of an insolvent estate is not bound to inventory and account for lands, the legal title to which was in the intestate at the time of his decease, but the equitable title in another. *Sherman, Admr. v. Est. of Dodge*, 26.

2. The intestate, for the expressed consideration of \$1,000, executed and delivered to his son, a warranty deed of certain real and personal property, with the condition that the grantor and his wife should have the use and possession of the property during their lives, the grantee to have possession at their decease, and not until then. *Held* that the life estate so secured, or intended to be secured to the widow, should not, after the death of the grantor, be treated as a part of his estate, except for the payment of debts existing at the time of the conveyance. *Ib.*

ASSIGNMENT.

1. A person in the actual employment of another, from whom he is receiving wages at a stipulated rate, may make a valid assignment of his future earnings, although the employment is for no definite period, and may be terminated at any time by either party. *Thayer et al. v. Kelley & Tr.*, 19.

2. Such an assignment may be made for the purpose of obtaining future advances as well as to secure a present indebtedness. *Ib.*

3. An assignment by a firm, for the benefit of their creditors, of all their rights and title in certain specified real and personal property and a conveyance, at the same time, by one of the partners, for the same general object, of several parcels of land previously held by him, accompanied by an immediate suspension of the business of the firm, which is thereafter carried on by the assignees, will afford, in the absence of any showing to the contrary, a sufficient presumption that the assignment was of a sufficient amount of the assignor's property as to render it, in that respect, a general assignment. *Bishop et als. v. Trustees of Harts*, 71.

4. An assignment which is defective, on account of its containing a resulting trust before providing for all of the assignor's creditors, may be remedied by a new assignment, and probably, without resort to a new assignment, by a mere declaration of trust in favor of all of the creditors. *Merrill et als. v. Englesby, Tr.*, 150.

5. The word "void" in the act of 1843, declaring certain general assignments void, &c., construed as only implying inoperative or voidable. *Ib.*

6. An assignment which is inoperative under that statute, on account of its generality, may be cured by a new assignment, less general, in which a substantial portion of the assignor's estate is omitted and left exposed to attachment. *Ib.*

7. An assignment which is void or inoperative under that statute will, if assented to by the creditors, become operative and binding upon them. *Ib.*

8. The promise of an assignee to keep the assigned property for the benefit and security of certain sureties of the assignor is an original undertaking, and not within the statute of frauds. *Ib.*

9. A person will not be holden to an assignee for a debt due from him to the assignor, if he was liable, in an equal or greater amount, to another person, as surety for the assignor, which he has since paid, though he had not at the time of the assignment. *Barney v. Grover*, 391.

10. An assignee or other trustee who sells trust property by way of barter, or exchange, or on credit, should be charged with the cash value of the property at the time of the sale, and the interest thereon from that time;—unless in the case of a barter or exchange these in interest elect to affirm it. *Page v. Olcott et als.*, 465.

11. If he neglects to keep full and fair accounts of such sales, and their amount cannot be ascertained by him, he should be charged with the value of the property and interest. *Ib.*

12. A person not in debt may make a voluntary conveyance of his property for the purpose of securing his future support, which will be valid against his subsequent creditors. *Buchanan & Co. v. Clark & Tr.*, 799.

See CHANCERY, 6, 7; CORPORATION, 2; PARTNERSHIP, 2; TRUSTEE PROCESS, 2, 3, 4.

ASSUMPSIT.

1. Money may be recovered back which is paid in discharge of an alleged claim which is fictitious and false, and known so to be by the party making the claim, and who induces the payment by menaces, duress, or taking an undue advantage of the other party's situation. *Sartwell v. Horton*, 370.

2. Charges against the defendants, (an incorporated railroad company,) for services rendered by the plaintiff in procuring the passage of their act of incorporation, disallowed;—the services appearing to have been voluntarily rendered, and there having been no subsequent promise to pay them. No previous promise could be implied, when, at the time the services were rendered, the defendants were incapable of making an express contract. *Hall v. Vt. & Mass. R. Co.*, 401.

3. Charges for services of the plaintiff, who was one of the corporators named in the defendants' act of incorporation, in procuring the stock subscriptions necessary for a full organization of the company, allowed, though there was no express promise for their payment. The services being necessary, a promise for their payment would be implied. *Ib.*

4. Charges allowed also for services rendered by the plaintiff as a member of a committee of the corporators, and also of the directors, for procuring additional stock subscriptions, the corporators having voted, at the time the plaintiff was appointed a member of the committee, "that all reasonable expenses incurred in taking stock shall be audited and allowed;" and the directors, at the time the plaintiff was appointed a member of their committee, having voted to allow such compensation as they should deem proper, not exceeding one per cent if the subscriptions should be satisfactory. *Ib.*

5. Charges for similar services rendered after a rescission of the above vote of the directors, and after the stockholders had voted that no compensation should be allowed for such services, except under particular circumstances, disallowed. *Ib.*

6. The plaintiff having, at the request of the defendant, who was one of the selectmen of the town of Windsor, taken the highway tax-bill of one of the districts in said town, and having made expenditures of labor and money in the necessary repairs of the highways in said district, to an amount largely exceeding all that he was able to collect on said tax-bill, which he had been unable to recover of said town; *it was held* that, upon the facts found and reported, the defendant had assumed and was under no personal liability for the same. *Stone v. Huggins*, 617.

7. Damages sustained by the plaintiff from the non-performance by the defendant of an executory contract for the purchase of property from him, cannot be recovered for under the general money counts. *Hemenway v. Smith et als.*, 701.

See CONTRACT, 6.

ATTACHMENT.

1. Property attached may be sold upon mesne process in pursuance of the statute, (Comp. Stat. Ch. 81 § 81,) before the service of the writ is completed, by the delivery of a copy of it to the defendant. *Marshall v. Town*, 14.

2. A sale, upon mesne process, of a part only of the property attached, but for an amount exceeding the plaintiff's claim, and exceeding the amount to which the officer is commanded to attach, will not dissolve the attachment as to the remainder, or impair the creditor's lien upon it. *Ib.*

3. Property sold, which is in the possession of a third person, is subject to attachment, as the property of the vendor, until the vendee gives notice of his ownership. *Ib.*

4. If property is attached and removed to the building of a third person by his permission, but with an understanding that he is to assume no responsibility as to its custody or safe keeping, the attaching officer is to be regarded as the person having the possession of the property, and any notice, in reference to a change in the ownership of it, should be given to him, and not to the owner of the building. *Ib.*

5. A mere understanding, or parol agreement, that a person making advancements, or incurring a liability, shall be secured therefor upon certain real estate, will be inoperative against a *bona fide* purchaser, or an attaching creditor without notice. *Bailey v. Warners*, 87.

6. The expense of keeping animals attached may be deducted from the amount received upon their sale, and a subsequent satisfaction of the attachment liens by a payment of them by the debtor, will not deprive the officer of his right of retaining the expense of keeping. *Gleason v. Briggs*, 126.

7. The degree of diligence required of attaching officers and other bailees for hire, is that which prudent men exercise in the conduct of their own affairs. *Briggs v. Taylor*, 180.

8. This definition, which is now almost uniformly used by the English judges, seems more definite and just, and less liable to be misunderstood by juries, than the terms common or ordinary care or diligence. REDFIELD, CH. J. *Ib.*

9. An attachment of real estate is effected by the officer's leaving in the town

clerk's office a copy of the writ, with his return of such an attachment thereon. The making of the record or entries respecting it, which it is the duty of the town clerk to make, does not constitute any part of the attachment itself. *Brady v. French et al.*, 546.

10. By such an attachment the officer acquires no special property in the real estate, and has therefore no control over the lien thereby created. This lien can only be released or discharged by the creditor himself. *Ib.*

11. It will be presumed, until the contrary is shown, that an attachment of real estate was made under the direction and with the assent of the creditor; and declarations of the officer, made after the attachment, are not admissible for the purpose of showing that the attachment was not so made. *Ib.*

See LANDLORD AND TENANT, 8; NEGLIGENCE, 2; PLEADING, 7.

ATTORNEY.

1. A conversation with a lawyer in reference to matters about which it was probable there would be litigation, but in which there was no retainer of the lawyer, nor anything showing that his advice was sought to regulate the future conduct of the other party in relation thereto, is not privileged from disclosure as a confidential communication between client and counsel. *Thompson v. Kilborne*, 750.

2. The prevailing practice of the legal profession in this state, in giving opinions and advice upon legal subjects, without particular study and examination in reference thereto and corresponding pay or a distinct retainer, commented on and condemned. *Ib.*

See JURISDICTION, 2.

AUDITA QUERELA.

1. The judgment of a justice cannot be set aside by *audita querela* on account of his having refused to continue a cause when the defendant was sick and unable to attend a trial. *Amidon v. Aiken*, 440.

2. *Audita querela* may be maintained to set aside the judgment of a justice taken by default, after an agreement to discontinue the suit, or after negotiations from which the defendant understood that it was so agreed, the plaintiff knowing that the defendant so understood it. *Perkins v. Cooper*, 729.

3. An averment in a writ of *audita querela*, that the complainant, believing that the suit would not be entered in court, did not attend to defend the same, and that thereupon the defendant fraudulently procured judgment by default, *held*, after verdict, as equivalent to an allegation that the complainant absented himself from the trial under the expectation and confidence that the suit was to be discontinued, and that the defendant, knowing that he acted upon that confidence, procured judgment by default. *Ib.*

AWARD, See ARBITRATION.

BAILMENT.

1. The degree of diligence required of bailees for hire is that which prudent men exercise in the conduct of their affairs. *Briggs v. Taylor*, 180.

2. This definition, which is now almost uniformly used by the English judges, seems more definite and just, and less liable to be misunderstood by juries, than the terms common and ordinary care or diligence. *REDFIELD CH. J.* *Ib.*

3. A bailee of property, who has an interest in it, may maintain an action in his own name for an injury done to it, either tortwise, or by breach of any obligation or duty which another may be under, in reference to it. *White et al. v. Bascom et al.*, 268.

4. The plaintiffs engaged the defendants to tow for them a boat containing merchandise, which the plaintiffs were transporting as common carriers, and which was afterwards lost by the neglect and want of ordinary care of the defendants. *Held*, that the plaintiffs might recover the value of the merchandize lost, though they had not paid the owners, or received any pay for the transportation of it. *Id.*

5. The plaintiff delivered to the defendant a quantity of palm-leaf, for which the defendant gave a written receipt and agreement to get it worked into hats, or return it when called for, and specified the price at which it was to be accounted for, if used. *Held*,

That the contract was one of bailment merely, and not of sale, the leaf not having been used; and that the defendant was bound to use ordinary care in looking to and preserving it. *Brown v. Hitchcock*, 452.

See INWKEEPER, I.

BANK.

1. The stock of a bank in this state, which is owned by a person residing out of it, cannot be voted on at the election of directors, though it stands, upon the books of the bank, in the names of inhabitants of this state, to whom it had been transferred for the purpose of enabling them to vote upon it. *State ex rel. Danforth et als. v. Hunton et als.* 584.

2. Question of fact as to the character, in this respect, of a majority of the votes which were cast against the defendants, in the election of directors of the White River Bank, examined and determined. *Id.*

3. An action upon a bond and mortgage taken by a banking institution, organized under the general banking law of 1851, and assigned by them to the treasurer of the state, in pursuance of the seventh section of that law, cannot be maintained in the name of the banking institution, until it is reassigned by the treasurer, as provided in the ninth section of the same law. *South Royalton Bank v. Downer et al.* 635.

BANKRUPTCY.

1. The fact that, after the accruing of an account in favor of the plaintiff, he went into bankruptcy, under the late U. S. bankrupt law, and that the account was not included in the schedule of claims annexed to the petition of the defendant for the benefit of that law, will constitute no bar, in favor of the debtor, against the prosecution and collection, by the plaintiff, of such account. *Steele v. Town*, 771.

BILLS OF EXCHANGE, See PROMISSORY NOTES AND BILLS OF EXCHANGE.

BILLS OF LADING.

1. Consideration of the law respecting the transmission and endorsement of bills of lading and shipping receipts. *Davis & Aubin v. Bradley & Co.*, 118.

2. Where the forwarding merchant gives a shipper's receipt or inland bill of lading for goods shipped on board a boat on Lake Champlain, acknowledging to have received them to be forwarded to the consignees by name, and this is sent to the

consignees, and they make advances upon the faith of it, the title and possession of the goods are thereby so far vested in the consignees, that they are not liable for the consignors' debts, or, if so, only subject to the consignees' lien for advancements. *Id.*

BOND, *See* PROBATE COURT, 4.

BOOK ACCOUNT.

1. Executions and notes may, by agreement, be charged and recovered for in the action on book account. *Gleason v. Briggs*, 135.

2. But a claim for a horse attached and not sold, or returned after a discharge of the attachment, or any claim against a person on account of his official neglect, as a deputy sheriff, cannot, without his consent, be adjusted in the book action. *Id.*

3. If promissory notes go into the hands of a bailiff or receiver under a contract, he may be called to an account respecting them in the common law action of account, and in some cases, since the law of 1862, (laws of 1862 p. 9,) in the action on book. *Woodward v. Harlow*, 338.

4. The plaintiff, a constable, had for collection several taxes against the intestate, between whom and the plaintiff there were running and mutual accounts, and it was understood that these taxes should be settled for as a matter of deal and account between them in the settlement of their other accounts; and the plaintiff paid over the amount of the taxes without collecting them. *Held* that he might recover the amount so paid in an action on book account. *Noyes v. Est. of Hall*, 645.

5. The bringing of an action on book account is not, *per se*, a revocation of an authority previously given by the plaintiff to the defendant, to pay a third person certain items in the plaintiff's account. If the defendant, at the commencement of the suit but before the audit, pay such items to a third person in pursuance of an authority previously given, and not revoked, he should be allowed for such payment, although he thereby obtains a balance of the account in his favor. *Walker v. Barrington*, 781.

See EVIDENCE, 17; JURISDICTION, 5, 6.

BOUNDARY.

1. The recognition, by the proprietors of adjoining lots, of a particular line as their division line, and their acquiescence in it for a period of fifteen years, will establish it and make it thereafter binding, if, during that time, either proprietor had a continued, though it was only a constructive possession of his lot. *Clark v. Tabor*, 222.

2. If adjoining proprietors recognize a particular line as their division line, but, by agreement, build their division fence where it is most convenient, without endeavoring to place it on the line, a part of it being on one side and a part on the other, and agree that when the land is cleared up the fence shall be put upon the line, a mere occupation by either proprietor to such fence for a period of fifteen years, would not establish the irregular line upon which the fence was built;—but would establish the line indicated by the general direction of the fence which the parties recognized and had in mind at the time the fence was built. *Id.*

3. Lands bounded on Lake Champlain extend to the edge of the water at low water mark. The same rule applied, in this case, to lands near the lake bounded on a creek emptying into, and the waters of which ordinarily maintain the same level, and rise and fall with those of the lake; there being no claim made that the boundary should extend to the centre of the creek. *Fletcher v. Phelps*, 257.

4. Parol testimony is admissible to show the existence of monuments from and to which commissioners surveyed in setting out a widow's dower, where they have given only a general description of the premises in their return, as, in this instance, "three rows of apple trees on the west side of the orchard." *Patch et ux. v. Keeler et al.*, 332.

5. Considerations involved and rules to be applied in determining the eastern line of premises set out with only the general description of "three rows of apple trees on the east side of the orchard, running north and south in the centre between the third and fourth rows." *Ib.*

6. An award defining a boundary will be defeated by proof that there were no such monuments as are referred to in the award, for the purpose of locating the boundary. *Giddings v. Hadaway*, 342.

CARRIER, *See* BAILMENT, 3, 4.

CERTIORARI.

1. The proper office of, and proceeding upon writs of *certiorari* and *mandamus* in the nature of a *procedendo* considered. *Woodstock v. Gallup*, 537.

CHAMPERTY, *See* MAINTENANCE.

CHANCERY.

1. The court of chancery may vacate a decree made and enrolled upon, and in consequence of a bill being taken as confessed, so as to permit a defense to the suit upon its merits. *Hall & Bingham v. Lamb et al.*, 86.

2. An application for this purpose is addressed to the discretion of the court of chancery, and should not be considered and determined by the supreme court. *Ib.*

3. If the application is granted, it is only an interlocutory, and not a final order or decree, and no appeal can be taken from it. *Ib.*

4. An action of debt will not lie upon a decree of the court of chancery which merely adjudges the existence and amount of a lien upon real estate, and provides, in default of its payment otherwise, for an application of the real estate towards its satisfaction. *Manley et al. v. Slason*, 346.

5. The decree counted upon in the present case adjudged to be such a decree. *Ib.*

6. Upon a bill in chancery against an assignee or other trustee, for a breach of his trust, he should be held to account only for such neglects or breaches of duty as are charged in the bill. *Page v. Olcott et als.*, 465.

7. The preferred creditors in an assignment need not be made parties to a bill for an account, brought against the assignee, by a general creditor who claims only the benefit of such a balance as shall remain after paying the preferred creditors. *Ib.*

8. If the want of proper parties to a bill in chancery is not insisted on in the answer, it cannot, as a general rule, be insisted on at the hearing. *Ib.*

9. A court of equity in this state may enjoin parties from proceeding in a court of law in another state: but on principles of courtesy, and, perhaps of policy, this power should not be exercised where the court of law has a concurrent jurisdiction,

which was first assumed and exercised over the subject matter, unless there should exist some peculiar equitable ground for so doing. *Bank of B. Falls v. R. & B. R. Company et als.*, 470.

10. The mere preference of the orators to have the matter determined by their own domestic tribunals, is not a sufficient ground for such an interference; and the inability of the court of chancery to enforce the injunction, is a good reason why it should not be granted when the parties to be enjoined reside out of the state, and have no property within it for a writ of sequestration to operate upon. *Ib.*

11. Consideration of the above, and other reasons why, in the present case, such an injunction should not be granted; nor the validity of a deed, upon which the defendants' right of action in the suit at law in another state depends, be tried and determined by a court of equity here. *Ib.*

12. Demurring to a bill in chancery, for want of equity in it, is submitting to the jurisdiction of the court. The question as to the jurisdiction of the court over the defendants, should be presented by plea. *Ib.*

See DEED 2, 3, 4.

CHOSSES IN ACTION.

1. A person's choses in action would be included in a conveyance of all his personal property of every name and nature. *Sherman, Admr. v. Est. of Dodge*, 26.

See HUSBAND AND WIFE 8, 9.

CLAIMS.

1. Promissory notes held by one party against the other would be included under the term "claims," in an agreement between two persons not to take advantage of the statute of limitations having run upon the other's claims. *Noyes v. Estate of Hall*, 645.

See CONTINGENT CLAIMS.

COLLATERAL SECURITY, *See* GUARANTY 11.

COMMON CARRIER, *See* BAILMENT 8, 4.

CONDITION PRECEDENT, *See* ACCOUNT 3; ACTION 7.

CONFESSION OF JUDGMENT, *See* JUDGMENT 1; TRUSTEE PROCESS 7.

CONFIDENTIAL COMMUNICATION, *See* ATTORNEY 1; PARTY 8.

CONFLICT OF LAWS, *See* FOREIGN LAW 1; PARTNERSHIP 5.

CONSIDERATION, *See* PROMISSORY NOTES 1.

CONSIGNMENT.

1. To give a factor a lien upon goods consigned to, but not actually received by him, the consignment must be to him in terms, and he must have made advances or acceptances upon the faith of it. *Davis & Aubin v. Bradley & Co.*, 118.

2. B. & H. B. delivered to the defendants, who were storage and forwarding merchants, several sacks of wool, for which the defendants gave receipts, specifying

that they were for the plaintiffs, or to be forwarded to the plaintiffs. These receipts were sent to the plaintiffs, and they, upon the credit of, and with reference to said wool, accepted drafts drawn upon them by B. & H. B. *Held*, that the plaintiffs thereby obtained the constructive possession of the wool, and had a lien upon it for the amount of their acceptances. *Id.*

8. Where the forwarding merchant gives a shipper's receipt or inland bill of lading for goods shipped on board a boat on Lake Champlain, acknowledging to have received them to be forwarded to the consignees by name, and this is sent to the consignees, and they make advances upon the faith of it, the title and possession of the goods are thereby so far vested in the consignees, that they are not liable for the consignors' debts, or, if so, only subject to the consignees' lien for advances. *Id.*

CONTINGENT CLAIM, *See* APPEAL 1; PROBATE COURT 2.

CONTRACT.

1. One L. was indebted to the plaintiff, but had executions in the hands of the plaintiff, as deputy sheriff, for which he had become holden to an amount exceeding L.'s indebtedness. The defendant bought the execution of L., and in part payment therefor, promised to pay the amount L. was owing to the plaintiff, in a settlement of accounts between the plaintiff and himself, and assented to its being charged to him. *Held*, that the plaintiff's claim therefor against the defendant was valid, and that the promise of the defendant was not within the statute of frauds. *Gleason v. Briggs*, 126.

2. One T. sent to the plaintiff, as deputy sheriff, an execution in his favor against the defendant, which, at the defendant's request, and upon his promise to pay and indemnify him for so doing, the plaintiff levied upon the defendant's real estate. T. sued the plaintiff for not otherwise collecting the execution, and recovered a judgment against him for the amount of the debt, which judgment the defendant paid. T. refused to pay the plaintiff's fees for levying the execution, and the plaintiff then charged them to the defendant. *Held*, that it was not a contract for the violation by the plaintiff of his official duty, and that the defendant was liable upon his promise for the fees charged. *Id.*

3. Where there is a written contract, it cannot be shown by oral testimony that, at the time of its execution, it was agreed and understood that the writing was a sham, and designed only to deceive the creditors of one of the parties; or that the real agreement between the parties was different from that expressed in the writing. *Conner v. Carpenter*, 287.

4. M. C. contracted to work for the defendant for an entire term, and before its expiration gave the plaintiff an order for a part of his wages. The defendant accepted the order so far as he was owing M. C. or should be owing him at a subsequent, specified time. Soon after this acceptance, and before the expiration of the term, M. C. abandoned the defendant's service and absconded, thereby damaging the defendant to a greater amount than would be due him, *pro rata*, for the time he had labored. *Held*, that the defendant's acceptance was absolute and unconditional as to the amount then due, and obligated him to pay the plaintiff the wages of M. C., *pro rata*, to the time of the acceptance, without deduction on account of the damages subsequently sustained. *Bellows v. Bingham*, 248.

5. The plaintiff covenanted to deliver to the defendant certain quantities of coal before certain specified dates, and the defendant covenanted to pay the plaintiff "for the above named coal" a specified price, "to be paid the first of each month, for all delivered." *Held*, that the defendant's covenant was dependent, and only bound him to pay, at any particular time, for the amount of coal delivered, if all

had been then delivered which was required by the plaintiff's covenant, *Lawrence v. Davey*, 264.

6. The plaintiff's testimony tended to prove that after a delivery of a less quantity of coal than the contract required, he informed the defendant that he could not fulfill, and if the defendant intended to take advantage of it he should not deliver any more, and that he should deliver no more unless the plaintiff paid for it irrespective of the contract; and that thereupon the defendant said that he wanted the plaintiff to deliver the coal, and that he would not take any advantage, but would pay for the coal delivered. *Held*, that this testimony, if believed, would entitle the plaintiff to recover in assumpsit for the coal then and thereafter delivered, without any reference to the quantity stipulated for. *Ib.*

7. Construction of a contract for the sale and delivery by G. & G. G. to the plaintiffs, of a quantity of logs, as to the place of delivery, and time when the property would vest in the plaintiffs. *Birge et al. v. Edgerton*, 291.

8. In a contract for a warranty deed, a deed containing the usual covenants of seizin and against incumbrances is intended. *Bowen v. Thrall et als.*, 332.

9. The orator purchased of the defendant J., an undivided half of a certain saw-mill, &c., which J. agreed to convey to him by a warranty deed, containing the usual covenants of seizin and against incumbrances. The deed given conveyed only J.'s "right, title and interest in" the premises, and contained no covenant except one to warrant and defend the "aforesaid premises." The premises were incumbered by a mortgage previously given by J., by virtue of which the mortgagee subsequently took and held possession, and the defendants were endeavoring, by an action at law, to collect a note given by the orator towards the purchase money. *Held*, that the deed executed was not conformable to the contract, and that the orator was entitled to an injunction against the collection of the note, until the mortgage incumbrance was removed, and a deed given agreeable to the contract. *Ib.*

10. A writing respecting the sale of the farm of the plaintiff to the defendant, which contained some agreement respecting the disposition of certain fodder then on the farm, was left in the possession of the plaintiff, who, not having it with him when the defendant met him to complete the purchase of the farm in pursuance thereof, gave to the defendant, before the delivery of the deed, and upon his calling for the original agreement, another writing agreeing to produce the first one, or take the defendant's recollection and construction of it. *Held* that this bound the plaintiff to take the defendant's recollection and construction of the original writing if not produced, though the plaintiff proved its loss, and swore to its being different in its provisions from those insisted upon by the defendant. *Carpenter v. French*, 798.

See BAILMENT 5; EVIDENCE 5; FRAUDS, (STATUTE OF); GUARANTY 7, 8.

ILLEGAL CONTRACT, *see* that title.

CONVEYANCE OF REAL ESTATE, *See* DEED; REAL ESTATE.

CORPORATION.

1. In a suit in favor of a corporation, their corporate existence can be denied only by a special plea; and need not be proved under the general issue. *Alma Ins. Co. v. Wires & Peck*, 93.

2. *Semble*. That an officer of a corporation, who is entrusted with the collection of its debts, would be authorized to assign them, without recourse, upon receiving their full amount. *Ib.*

3. Directors of a corporation as a general rule, are not entitled to compensation for their personal services unless rendered under some express contract. *Hall v. Vi. & Mass. R. Company*, 401.

4. The statute of limitations does not commence running against a foreign corporation until they have attachable property in this state, although, previous to that time, there may be directors and stockholders of such corporation residing in the state. *Id.*

5. The statute, (Comp. Stat. ch. 81 §19, p. 244,) providing for the service of writs upon corporations, by leaving copies with any of their officers or stockholders in the absence of their clerks, has reference exclusively to corporations within this state. *Id.*

6. Neither the individual admissions of the members of a corporation, established for public purposes and for the promotion of the private interests of the corporators, nor the personal admissions of its president, or of the individual members of its executive committee, respecting a debt due from the corporation will prevent the operation of the statute of limitations upon it. *Lyman v. Norwich University*, 560.

See ASSUMPSIT 2 to 5 inc.

COSTS.

1. Separate travel and attendance fees before a justice, and travel and term fees in the county court, may be taxed by two or more defendants in an action of tort, unless by joining in a plea in bar they so identify their interests as to make the success of each dependant upon that of the other. *Downer v. Flint et al.*, 527.

2. And in this respect the general issue, in actions of tort, though, in form, joint, is regarded as a several plea. *Id.*

3. In this state the costs of the prevailing party in an arbitration may be awarded in his favor, though there be no provision for it in the submission. *Bowman v. Downer*, 522.

4. No costs allowed to the defendants who had succeeded to a legal estate as heirs, but which, it was adjudged, they held only as trustees of the orator to whom they were decreed to convey it, they having resisted the orator's claim after being made aware of it before the commencement of his suit. *Wallace v. Bovens*, 638.

See ACTION 8; JUSTICE 2.

COVENANT.

1. The plaintiff covenanted to deliver to the defendant certain quantities of coal before certain specified dates and the defendant covenanted to pay the plaintiff "for the above named coal" a specified price, "to be paid the first of each month, for all delivered." Held, that the defendant's covenant was dependent, and only bound him to pay, at any particular time, for the amount of coal delivered, if all had been then delivered which was required by the plaintiff's covenant. *Lawrence v. Davey*, 264.

See DEED 2, 4, 6; MORTGAGE 6.

CRIMINAL LAW.

1. Upon a trial upon an indictment for rape or incest, if the person upon whom the offence is charged to have been committed is examined as a witness for the

prosecution, she may be inquired of, upon cross-examination, whether she had not, at certain specified times and places, had sexual intercourse with other men whose names are mentioned. *BENNETT, J.*, dissenting. *State v. Johnson*, 512.

2. *Quære*, whether the witness would be bound to answer such an inquiry. *Ib.*

3. In an information against a railroad company, a description of the respondent by name, and as "a corporation existing under and by virtue of the laws of this state, duly organized and doing business," is a sufficient allegation that it is a corporation *in esse*. *State v. Vermont Central Railroad Company*, 583.

4. The time and place, when and where their existence commenced, need not be averred. *Ib.*

5. The information (*q. v.*) in the present case, against the respondents, (a railroad corporation) for unreasonably neglecting to ring a bell, or blow a steam whistle when crossing a public road with their engines, &c.; *held* sufficient. *Ib.*

See INTOXICATING LIQUOR: MAINTENANCE.

DAMAGES.

1. The plaintiff claimed title to a piece of land upon which a quantity of wood had been cut by a person claiming adversely to her, by whose employment the defendant removed the wood about one hundred rods from the place where it was cut, but left it on the same lot. *Held*, that if the wood belonged to the plaintiff, so that she could maintain an action of trespass against the defendant for the removal, she could recover only nominal damage, or such actual damages as were occasioned by the removal. *Pratt v. Battles*, 685.

See ACTION 10; LANDLORD AND TENANT 3.

DEBT.

1. An action of debt will not lie upon a decree of the court of chancery which merely adjudges the existence and amount of a lien upon real estate, and provides, in default of its payment otherwise, for an application of the real estate towards its satisfaction. *Manly et al v. Slason*, 346.

DECLARATION, *See* PLEADING.

DEED.

1. A father deeded to his son, as a compensation for his services, a piece of land, with a condition in the deed that the grantor was to have the use and improvement of the premises during his life, if he should have occasion therefor, and should choose to use them. *Held*, that the grantor retained a life estate in the premises which was extinguishable only by deed; and which, after a voluntary surrender of the possession of the premises to his son, but without any writing, he could again avail himself of, whenever he chose. *Colby v. Colby*, 10.

2. A covenant to stand seized to the use of a third person, which would be executed under the statute of Henry VIII., were that statute in force here, will be enforced by a court of equity. *Sherman, Admr. v. Est. of Dodge*, 26.

3. The intestate, for the expressed consideration of \$1,000, executed and delivered to his son, a warranty deed of certain real and personal property, with the condition that the grantor and his wife should have the use and possession of the prop-

erty during their lives, the grantee to have possession at their decease and not until then. *Held*, that this was a grant of the intestate's whole estate, upon a condition subsequent that the grantee should permit the grantor and his wife to use and enjoy the property during their lives, the performance of which a court of equity would enforce. *Id.*

4. *Held, also*—that if a life estate were regarded as excepted from the conveyance, and as remaining in the grantor, the deed would be good as an agreement to convey the use for the benefit of the wife after the grantor's death, or, as a covenant to stand seized of the premises to her use, either of which would be enforced by a court of equity. *Id.*

5. It may be shown, for the purpose of preventing the operation and effect of a deed, in the hands of the grantee named in it, that it never was lawfully delivered to him, but that it was delivered as an escrow to a third person, and that he wrongfully and without authority delivered it to the grantee. *Nichols et al. v. Nichols et al.*, 228.

6. In a contract for a warranty deed, a deed containing the usual covenants of seizin and against incumbrances is intended. *Bowen v. Thrall et als.*, 882.

7. A conveyance of real estate, with covenants of warranty, to a person, his heirs and assigns, as long as wood grows and water runs, in the form of a lease, but reserving only a nominal rent if demanded, and without reserving any right of re-entry, is, in effect, a conveyance of the fee; and does not create such a tenancy as, upon a repudiation of it, would require notice to be given to the grantor. The object of a notice of the repudiation of a tenancy being required is to enable a landlord to protect his rights; but under such a conveyance, the conveyer would have no rights to protect. *Propagation Society v. Sharon et als.*, 608.

8. In a deed from a husband and wife, executed while our statute required the acknowledgment by the wife to be made by her separately from her husband, it should appear in the certificate of acknowledgment that it was so acknowledged by her. If it does not, the deed will be inoperative and void as against the wife. *Pratt v. Battels*, 686.

9. The construction of a deed should not be submitted to the decision of the jury without limitation or restriction, or specific instruction in reference to it. But if it is, and they give it a correct construction, a new trial will not be granted. *Morse v. Weymouth*, 824.

10. A deed of "a part of lot No. 17," "laying in the N. E. corner of said lot, and is that part of said lot which lays on the north side of the road," and an exception in a deed of lot No. 17 to another person, of the same date, of that part of it "which lays on the north side of the road at the N. E. corner of said lot, estimated at about three-fourths of an acre," construed as conveying and excepting not only the north-east corner piece but also a small strip on the north-easterly side of a road running from the south-east to the north-west over said lot but separated from the N. E. corner piece by a curve in the road, which run for a short distance upon the easterly line of the lot. *Id.*

See CONTRACT 9.

DEMAND.

1. An attempt to settle may perhaps be fairly enough be regarded as a demand of payment by both parties for whatever should be found due on the other side. *Gleason v. Briggs*, 136.

See GUARANTY 5, 6.

DEPOSITION.

1. A party is entitled to a reasonable time to attend, by himself and his counsel, the taking of a deposition; and cannot be required to attend to it during term time. *Stephens v. Thompson et al.*, 77.

2. A deposition taken without notice before the passage of the act entitled "an act in relation to depositions," approved November 14, 1854, (Laws of 1854, p. 5,) held admissible after the law took effect, without having been filed thirty days previous to the session of the court at which it was offered. *Admr. of Sheldon v. Griswold*, 376.

8. The witness law of 1852, (Laws of 1852, p. 11,) contemplated the examination of a party as a witness only in open court, and did not authorize the using of his deposition. *Ib.* (But see laws of 1855, p. 12.)

See PARTNERSHIP 6.

DESCENT OF REAL ESTATE, See WIDOW 5.

DIRECTORS.

1. Directors, as a general rule, are not entitled to compensation for their personal services, unless rendered under some express contract. *Hall v. Vr. & Mass. R. Co.*, 401.

DISTRIBUTION OF PERSONAL PROPERTY, See HUSBAND AND WIFE, 2;
PROBATE COURT 6, 8, 9; WIDOW 5, 6.

DIVORCE, See MARRIAGE 1.

DUE-BILL.

1. Upon a partial settlement, the amount of the intestate's account was ascertained and a due-bill given for it, which included items which the plaintiff had previously paid to a third person who was authorized to receive it. *Held* that the fact of such a previous payment might be shown, and that its effect was, not to vary the operation of or contradict the due-bill, but to establish a valid offset to so much of it. *Noyes v. Est. of Hall*, 645.

DURESS, See ASSUMPSIT 1.

EJECTMENT.

1. Considerations involved and rules to be applied in determining the eastern line of premises set out as part of a widow's dower, with only the general description of "three rows of apple trees on the east side of the orchard, running north and south in the centre between the third and fourth rows." *Patch et al. v. Keeler et al.*, 832.

2. One of the defendants having received a deed of the premises east of the three rows of apple trees in question, which was given and held by him only as a mortgage, claimed that his grantor was entitled to hold one of the rows which he was in possession of, as not embraced in, but which the jury found was included in the dower. *Held* that his claim, in this respect, rendered him liable, equally with his grantor, to an action of ejectment brought for the recovery of the dower premises. *Ib.*

3. The residuary devisee consented to a sale by the executor, for the payment of debts and specific legacies of a portion of the testator's real estate; and, to save the expense of an order of sale from the probate court, quit-claimed the premises to the

executor, individually. The defendant being in the adverse possession of a part of the premises, an action of ejectment for the recovery of them was commenced in the name of the estate. The deed to the executor was not recorded, but the defendant, with knowledge of its existence, obtained from the devisee a deed to himself of the premises in dispute, which he put upon record. Between the times of the execution of the two deeds, the premises deeded to the executor were, by a decree of the probate court, assigned to the residuary devisee. The executor having deceased, the action of ejectment was prosecuted in the name of the administrator *de bonis non*, for the benefit of the person to whom the executor had sold. *Held* that the title derived by the devisee under the will, and the assignment of the probate court, enured to the benefit of the person who purchased of the executor;—that the defendant could not defend the action on the strength of his deed;—and that the action was not defeated by the conveyance to the executor, the defendant being at the time in adverse possession. *Admr. of Cray v. Hall*, 364.

EQUITABLE INTEREST.

1. R. sold to L. W. a piece of land, but, by mistake, his deed described an adjoining piece to which he had no title. L. W. took possession of the place designed to have been, and which he supposed was deeded. The oratrix, being a creditor of L. W., attached all his real estate in the town, and subsequently levied upon a portion of the premises so sold but not deeded. Between the attachment and the levy, A. W. claiming to have an equitable interest in the premises, obtained a quit-claim deed of them from R. *Held* that the oratrix acquired by her attachment and levy, an equitable interest in that portion of the premises set off on her execution; and that the attachment being constructive notice to A. W. of the oratrix's lien, he could not defeat her equitable right by his legal title, unless he had with it a superior equity. *Bailey v. Warners*, 87.

2. A mere understanding, or parol agreement, that a person making advancements, or incurring a liability, shall be secured therefor upon certain real estate, will be inoperative against a *bona fide* purchaser, or an attaching creditor without notice. *Id.*

12. The defendant gave the plaintiff a written lease of certain premises, and before the expiration of it he deeded the same premises to a third person without making any reservation of the plaintiff's rights. *Held*, that the fact that the grantee had such notice of the plaintiff's rights as would enable the plaintiff to maintain them in a court of equity, constituted no defense and would not prevent the plaintiff from pursuing the defendant on his contract in an action at law. *Staples v. Flint*, 794.

ERROR, *See* PRACTICE 3.

ESCROW, *See* DEED 5.

ESTOPPEL.

1. A disclaimer as to the ownership of property, the title of which is really in the plaintiff, which induced the defendant to sell it, when he would not have done so but for the disclaimer, *held* to estop the plaintiff from afterwards setting up his title and recovering of the defendant for the conversion of the property. *Downer v. Flint et al.*, 527.

See CONTRACT 10; EVIDENCE 5.

EVIDENCE.

1 The receipt of a note, "to balance account," is, *prima facie*, a discharge of the

account; and imposes the burden of proof upon the opposite party to show it otherwise. *Stephens v. Thompson et al.*, 77.

2. A witness may be inquired of, and may testify as to his *opinion* respecting the solvency of a person, when he has stated the facts and means of knowledge upon which his opinion is founded. *Sherman v. Blodgett*, 149.

3. A decision of the county court, as to the sufficiency of certain proof, *held*, to refer to its character, or quality and competency, and not merely to its quantity or force in convincing the mind. *Commercial Bank v. Strong*, 816.

4. A written admission by the endorser of a bill or note, that he received due notice of its dishonor, though strong evidence, is not *conclusive* of the fact against him. He may show that the paper was signed under a misapprehension or mistake as to the bill or note referred to, and that no notice of the dishonor was, in point of fact, given. *Commercial Bank v. Clark*, 825.

5. Such a writing, in the present case, *held*, not to operate either as an admission for the purpose of a trial, as a contract, or as an *estoppel in pais*. *Id.*

6. When in a written description of a piece of land an uncertainty arises, not from the terms used, but from their application to, or the nature or situation of the subject matter, oral evidence is admissible in explanation of it. *Patch et ux. v. Keeler et al.*, 832.

7. Parol testimony is admissible to show the existence of monuments from and to which commissioners surveyed in setting out a widow's dower, where they have given only a general description of the premises in their return, as, in this instance, "three rows of apple trees on the west side of the orchard." *Id.*

8. The testator in consideration of the conveyance of a farm to him, upon which the plaintiff, at the request of the testator's grantor, had erected a barn, promised to pay the plaintiff the cost of said barn. The grantor's deed to the testator was for the expressed consideration of \$800; and the testator gave to the grantor a bond and mortgage, providing for his support, and the payment of specified sums to his daughters. *Held*, that though the bond might be the only evidence as to the extent of any personal claim in favor of the grantor, yet that it would not prevent the plaintiff from showing the existence of an additional and suppletory agreement by parol, in his own favor, as entering into and constituting a part of the consideration expressed in the deed. *Wait v. Exr. of Wait*, 350.

9. The due organization of a town, previous to a particular time, may be presumed from the fact that at that time they had appointed town officers, and were exercising the rights and powers belonging to organized towns. *Londonderry v. Andover*, 418.

10. The declarations of a person, as to the place of his former residence, are not admissible for the purpose of proving that he actually did reside in that place. *Id.*

11. The plaintiff delivered to the defendant a quantity of palmleaf, for which the defendant gave a written receipt and agreement to get it worked into hats or return it when called for, and specified the price at which it was to be accounted for, if used. *Held*, that parol proof was inadmissible to show that, at the time of the execution of the writing, it was agreed that the palmleaf should remain at the plaintiff's risk; but that testimony was admissible in reference to the condition of the leaf when left, the usage and custom in packing leaf for market, and the necessity and custom of taking it from the sacks and exposing it to the air, and the care exercised by the defendant in that respect. *Brown v. Hitchcock*, 452.

12. What is said by a person when he goes to call upon another may be given in evidence as a part of the *res gestæ*, for the purpose of showing the true object and character of the act, when the act itself is equivocal, and the person called upon claims for it a different character and effect from that intended. *Danforth v. Streeter*, 490.

13. To prove that a person was a member of a firm, testimony showing that he had a deed of an undivided portion of their property, and that, with his knowledge, suits at law and in chancery respecting said property were instituted by and in the name of the firm in which he was joined as plaintiff, and that he took an active part in advising about, and in making repairs upon said property, is admissible. *Carlton et al. v. Ludlow W. Mill*, 504.

14. The plaintiff claimed to recover the amount of certain taxes, which he claimed had been assessed against the defendant and placed for collection in the hands of the plaintiff, as constable, and by him paid to the town, to which he was accountable, and that the defendant had promised to pay him. *Held*, that the tax-bills in the hands of the plaintiff were admissible, and *prima facie* evidence of the existence of the taxes, and the amount for which the defendant was liable upon them. *Bowman v. Downer*, 582.

15. *Held*, also, that the fact that the plaintiff had given bonds, as constable, and received the tax-bills in question, and had settled with the town and taken up his bonds, afforded *prima facie* evidence that he had paid the taxes in assessed against the defendant. *Ib.*

16. Proof by a physician's books, and his own oath, that his charges in question were made at his usual rates of charge for similar services for other persons, in the same neighborhood, whom he attended, is admissible, in connection with proof that these rates were known to the person charged. *Paige v. Morgan*, 585.

17. If testimony before an auditor would have been admissible in any view, or in connection with any other evidence, and it appeared that it was offered and admitted "among other things not objected to," which are not more particularly stated, it cannot, on exceptions, be held to have been inadmissible. *Ib.*

18. Where to a declaration for the breach of a contract in not furnishing a proper and suitable kiln and dry-house, in which to secure certain hops, the defendant plead that he did prepare a suitable kiln and dry-house, ready for use when it was required, and according to the true intent and meaning of the contract, and to the full satisfaction of the plaintiff; evidence that that the plaintiff consented that a new kiln and dry-house need not be built, but that one of his own might, and that is accordingly was used, and the plaintiff paid for the use of it, is admissible, and has a tendency to support the issue presented by the defendant's plea. *Thompson v. Kilborne*, 750.

19. In an action upon a recognizance, entered into by a third person for the appeal of a defendant from the judgment of a justice against him, the fact that such defendant, about the time of his appeal, gave in his list for property to a certain amount, is admissible as tending to show that he then had that amount of property. *Richardson v. Hitchcock*, 757.

20. The opinion of a witness in reference to the solvency of a person may be given in connection with the facts on which the opinion is grounded. *Ib.*

21. For the purpose of showing the insolvency of the defendant before the rendition of a final judgment against him, it may be shown that soon thereafter he was

admitted to, and took the poor debtor's oath before the jail commissioners, upon an execution in favor of a third person. *Ib.*

22. This may be shown by parol, the jail commissioners not being regarded as a court of record; and, for the mere purpose of showing the defendant's insolvency, it is immaterial whether a certificate, properly signed, was left with the jailor or not. *Ib.*

See ATTACHMENT 11; ATTORNEY 1; CRIMINAL LAW 1, 2; GUARANTY 1; PARTNERSHIP 8; PAYMENT 5; PROBATE COURT 11; PROMISSORY NOTES AND BILLS OF EXCHANGE 4; RAILROAD 6; SCHOOL TEACHER 2; TAXES 11; WATER AND WATER-COURSES 3; WITNESS.

EXECUTORS AND ADMINISTRATORS.

1. The administrator of an insolvent estate is not bound to inventory and account for lands, the legal title to which was in the intestate, at the time of his decease, but the equitable title in another. *Sherman, Admr. v. Est. of Dodge*, 26.

2. Where it is obvious, from the writ and declaration, that the plaintiff sues as administrator, neither an express averment of the fact, or a conclusion that it is to the damage of the plaintiff "as administrator," is necessary. *Pope, Admr. v. Stacy*, 96.

3. In such a suit, causes of action which accrued during the life-time of the deceased may be joined with those which have accrued since. If, when recovered, they would all be assets in the administrator's hands. *Ib.*

4. The plaintiff and two others were executors of the last will of his father who, before his decease held a note against the defendant, which he placed in the hands of the plaintiff for collection; and the plaintiff subsequently took a new note, upon which he commenced the present suit, in his own name, as its bearer, after which the defendant paid the amount due upon it to the other executors, and obtained their discharge, they knowing of the suit, and agreeing to indemnify the defendant against it. *Held* that the note was under the control of the executors, and that the discharge of a majority of them was a valid defense. *Griswold v. Clark*, 681.

5. The jurisdiction of a probate court, in granting administration, cannot be collaterally attacked. *Abbott, Admr. v. Coburn & wife*, 663.

6. Debts due to a deceased person can be collected and administered upon, in the first instance, only in the state where the debtor resides. If paid to another administrator, the payment will be no protection against a suit in favor of an administrator appointed in that state. *Ib.*

7. If an intestate did not reside in this state at the time of his decease, money due to him from, or money belonging to his estate which is paid to a person who does not reside in this state, cannot be recovered of such person in an action brought by an administrator appointed here. *Ib.*

8. The debtor or person receiving the money would only be liable to an action in favor of an administrator appointed in the state of the residence either of the debtor or intestate. *Ib.*

9. An executor or administrator is entitled to an allowance against the estate for his time and services in taking care of the property of the estate, so long as it remains under his management, and he is accountable for it in that capacity, although

the use of the property was bequeathed to another, who during all the time had the income of it. *Admr. of Merrill v. True*, 676.

10. An administrator should be allowed for his expenditures in a law-suit in which he was unsuccessful, if he acted in good faith, and with reasonable prudence; and whether he did so or not, must ordinarily depend upon the facts in each particular case. *Heirs of Holmes v. Admr. of Holmes*, 765.

11. In the present case, the administrator allowed for such expenditures, it being found that he acted in good faith, and under the advice of suitable counsel, believing he had the right of the case *Ib.*

See ASSETS 2; PROBATE COURT 11.

EXPENSES.

1. The defendants, a corporation, voted "that all reasonable expenses incurred in taking stock shall be audited and allowed. Held that the "reasonable expenses" mentioned in the vote was not limited to cash expenditures, but extended also to personal services expended. *Hall v. Ft. & Mass. R. Company*, 401.

FACTOR, See LIEN 1, 2.

FALSE PRETENCES, See ILLEGAL CONTRACT 3.

FEME COVERT, See HUSBAND AND WIFE.

FENCES, See RAILROAD 3, 11.

FIXTURES.

1. Not only the manner and extent, but the object and purpose of the annexation of a chattel to a building, is to be considered in determining whether it has become a fixture and part of the realty. *Hill v. Wentworth*, 428.

2. That the article is essential to the use of the building for the business for which it is used, is not the test by which to determine whether or not it is a part of the realty. *Ib.*

3. To change the character of an article from a chattel to a fixture there should be some positive act and intent to that effect, on the part of the person annexing it to a building; and, if the intent is left in doubt upon an inspection of the property itself, taking into consideration its nature, the mode, extent, purpose and object of its annexation, it should be held to remain personal property. *Ib.*

4. Articles of machinery used in a manufactory do not become a part of the freehold when they are only attached to the building for the purpose of keeping them steadier, and in a manner best adapted to that purpose, so that their use as chattels may be more beneficial, and are attached in such a way that they may be removed without injury to the freehold or to the articles themselves as chattels. *Ib.*

5. An iron boiler, in a paper-mill, set in brick-work which was laid on a stone foundation placed in the ground up to which the floor was laid, together with the iron pipe connected with it by screws and bolts; engines for grinding rags, fixed in tubs standing on timbers up to which the floors of the building were scribed;—paper presses fastened to the building by cleats and with screws and nuts; calendar rolls in an iron frame screwed to timbers which were spiked to the floor;—a rag-cutter; a trimming-press set in a frame which was screwed to the floor, and a machine for making paper, which was fastened to the floor by cleats nailed around it and in

no other way, *held* to be no part of the real estate, as between mortgagor and mortgagee;—but otherwise of the iron shafting put up in the building by hangers of iron bolted to the beams and sills, and used for turning and carrying the machinery. *Ib.*

FOREIGN LAW.

1. If the subject-matter of a controversy in our courts arose in a foreign jurisdiction, by the laws of which it should be governed, it cannot be judicially noticed that those laws are different from our own, unless they are shown, by evidence, to be so. *Woodrow v. O'Conner*, 776.

FRAUD.

1. A false representation, not believed to be true at the time, which a vendor of property makes for the purpose of inducing a purchase of it, or a false impression produced by his words or acts for the purpose of misleading and obtaining an undue advantage, whereby a purchaser is deceived and injured, is both fraudulent and actionable. *Howard v. Gould*, 528.

2. The defendant, having information and reason to believe that his horse had the glanders, was inquired of by the plaintiff respecting it, and replied that he supposed the horse had the horse-distemper, but that the plaintiff could examine him; and did not communicate the information he had received respecting the glanders; and the plaintiff was thereby induced to trade for the horse, and was damaged in consequence of his actually having the glanders; *it was held* that the defendant was liable to the plaintiff on account of a fraudulent suppression of material facts, which, if known, would probably have prevented the trade. *Ib.*

FRAUD IN LAW, *See* SALE 2, 3.

FRAUDS, (STATUTE OF.)

1. If the agreement, for the non-performance of which an action is brought, was not to be performed within one year, no recovery can be had upon it, although that which formed the consideration of the agreement was to have been, and was paid or performed within that period; and no recovery can be had for or upon the consideration so paid or performed, unless it enured to the benefit of the defendant. *Pierce v. Estate of Paine*, 84.

2. One L. was indebted to the plaintiff, but had executions in the hands of the plaintiff, as deputy sheriff, for which he had become holden to an amount exceeding L.'s indebtedness. The defendant bought the execution of L., and in part payment therefor, promised to pay the amount L. was owing to the plaintiff, in a settlement of accounts between the plaintiff and himself, and assented to its being charged to him. *Held*, that the plaintiff's claim therefor against the defendant was valid, and that the promise of the defendant was not within the statute of frauds. *Gleason v. Briggs*, 135.

3. The promise of an assignee to keep the assigned property for the benefit and security of certain sureties of the assignor is an original undertaking, and not within the statute of frauds. *Merrill et als. v. Englesby, Tr.*, 150.

4. A parol promise to pay the debt of another in consideration of property placed by the debtor in the promisor's hands, is not within the statute of frauds. It is an original promise, and binding upon the promisor; and, in this respect, it is immaterial whether the liability of the original debtor continues or is discharged. *Wait v. Ezr. of Wait*, 350.

5. The testator in consideration of the conveyance of a farm to him, upon which the plaintiff, at the request of the testator's grantor, had erected a barn, promised to pay the plaintiff the cost of said barn. *Held* that this promise, being made upon a new consideration, was binding, though it was not in writing, and though the original liability of the grantor remained undischarged. *Id.*

6. A promise to pay a specified price for real estate, conveyed or agreed to be conveyed to the promisor, need not be in writing. If the whole agreement for the conveyance of the real estate, and for the payment of its consideration, be by parol, and there is a conveyance, or a sufficient tender of a conveyance, according to that part of the agreement, an action will lie upon the promise for the agreed price. *Hodges & wife v. Green*, 358.

7. The plaintiff having a demand against H. & D. which he was about to secure by an attachment of their property, the intestate, who had a larger claim against H. & D. than that of the plaintiff, promised that, if the plaintiff would forbear to commence a suit and make cost by attaching the property, he would pay the plaintiff's debt. The plaintiff did forbear, and assisted the intestate in securing his debt by an attachment, with other property, of that which the plaintiff was about to attach. *Held* that the promise was not within the statute of frauds, it being an absolute promise, in which the original debtor had no interest, and the consideration being entirely between the plaintiff and the intestate. *Lampson v. Hobart's Estate*, 697.

8. In a contract for the sale of real estate, a deed of which is executed and delivered, a promise by the purchaser to pay the consideration, or furnish security for it, is not within the statute of frauds; and, if only by parol, an action may be maintained upon it. *Ascotney Bank, et als. v. McKOrmsby*, 721.

9. The defendant, at the request of S., carried certain papers to the plaintiff, and informed him that S. wished him to commence suits thereon. The plaintiff refused to do so unless the defendant would become responsible for certain advances of money which the plaintiff would be obliged to make, whereupon the defendant assured the plaintiff that S. was good for that, and, if not, that he (the defendant) was; and thereupon the plaintiff commenced the suits. *Held*, that the defendant's undertaking was collateral only, and, not being in writing, could not be enforced, though, in point of fact, S. was not responsible; it not appearing that the defendant had acted in bad faith. *Steele v. Towne*, 771.

10. A subsequent promise of the defendant to pay the plaintiff, for which there was no consideration could not convert such collateral undertaking into an original one. *Id.*

11. The plaintiff sold at auction to the defendant, sixteen sheep for \$30.00. The sheep were then in a yard of the plaintiff, and he and the defendant drove them into another yard of the plaintiff, and the defendant then told the plaintiff, if he would keep them until a certain day, he (the defendant) would then come and get them and pay all bills. This was assented to by the plaintiff, and the sheep were so kept, but at the expiration of the time the defendant declined to take them. *Held*, that the property was sufficiently accepted and received within the meaning of those terms as used in the Compiled Statutes, § 2 chap. 64, entitled "The prevention of frauds, &c." *Green v. Merriam*, 801.

FUTURE ADVANCEMENTS, EARNINGS AND SUPPORT, See ASSIGNMENT
1, 2, 12.

GUARANTY.

1. Testimony showing the object for which a guaranty was given, that the guar

antor was present when it was delivered, and knew of the purchase of goods which the principal made under a contract contemplated by the guaranty, the guarantor's acquaintance with the business of the principal, and his general knowledge respecting the business transactions between the principal and the party to whom the guaranty is addressed, is admissible for the purpose of proving notice to the guarantor of the acceptance of the guaranty, and of the transactions of the other parties under it. *Noyes & Co. v. Nichols*, 159.

2. Notice to the guarantor of "about the amount" of the advancements which were made to the principal, on the credit of the guaranty, is all the notice which, in this respect, need be given. *Ib.*

3. Technical rules are not to be resorted to in the construction of a guaranty, where the meaning of the parties is plain and obvious. *Ib.*

4. The defendant promised the plaintiffs that if they would furnish N. with merchandise "upon commission or otherwise," the defendant would be accountable for all N.'s contracts and engagements, and, if he did not fulfill them as agreed, the defendant would guarantee the payment thereof. *Held* that the defendant was liable, under such a guaranty, for merchandise which the plaintiffs made a direct and absolute sale of to N. *Ib.*

5. *Held*, also, that, under such a guaranty, it was not necessary that the payment should first be demanded of the principal, and notice of his default be given to the guarantor, for the purpose of rendering him liable. *Ib.*

6. Where a guaranty is absolute and binds the surety to the fulfillment of the principal's contract unconditionally and in general terms, no demand of payment of the principal and notice of his default is necessary to charge the guarantor. *Ib.*

7. The defendant informed the plaintiffs that N. was desirous of obtaining goods upon a credit, and guaranteed the fulfillment of N.'s agreements with the plaintiffs according to his contracts. A contract was thereupon entered into by which the plaintiffs agreed to furnish N. certain goods, to be paid for by him from time to time, but with a provision that the goods should be owned by the plaintiffs until they were paid for. *Held*, that this was a conditional sale upon credit, and within the fair scope of the guaranty. *Ib.*

8. The contract provided that N. might pay for the goods in certain kinds of barter, and at the expiration of the year return the goods on hand at a certain discount; and that his indebtedness under a former contract, for which the defendant was liable under a previous guaranty, was first to be paid. *Held*, that these stipulations not operating to the injury of the defendant, did not prevent or discharge his liability; nor would it be affected by a want of notice of N.'s right to return the goods. *Ib.*

9. The plaintiffs, after the default of N., attached and sold his goods, including those which they had sold him, and applied the avails in part satisfaction of their claim; and they received from N. his note payable on demand, secured by mortgage as collateral, and not to be credited until paid, and upon which nothing had been paid; and they had also purchased, in the name of a third person, a prior mortgage upon the same premises, and caused it to be foreclosed, but the time for its redemption had not expired. *Held*, that neither of these acts discharged or affected the liability of the defendant as guarantor. *Ib.*

10. The defendants and H. W. C. signed and delivered a writing of the following tenor: "C. C. Trowbridge, Esq., President, Detroit, Michigan. R. H. & Co. are authorized to value upon us or either of us to the amount of \$25,000, in such

"amounts and on such time as they may require, which will be duly honored, and we hereby jointly and severally hold ourselves accountable for the acceptance and payment of such drafts."

Held, 1. That it might be shown by parol, that the writing was intended for the plaintiffs of whom said Trowbridge was president.

2. That the writing bound all the signers to the payment of such drafts as might be accepted by either of them.

3. That it was not answered by the acceptance and payment of drafts to the amount of \$25,000; but that it was a standing or continuing guaranty for that amount, the parties themselves having so treated and practically construed it.

4. That it extended to and provided for the payment of drafts made payable elsewhere than at the residence of the drawee, which had been accepted generally and recognized, and were obviously conformable to the expectation of the parties. *Michigan State Bank v. Pecks*, 200.

11. A person holden as surety on a letter of credit will be discharged if, without his consent, after the maturity of the paper, for the payment of which he is holden, the holder receive as collateral security for its payment another obligation with other sureties payable at a future time. *Michigan State Bank v. Est, of Leavenworth*. 209.

12. The death of a person who has given a letter of credit authorizing another to value on him to a certain amount for a limited period, and agreeing to accept the drafts drawn, and pay them if not paid by the drawer at maturity, will operate as a revocation of all authority to thereafter draw on him, though the person to whom, and for whose security the letter was given, has no notice of the death, and the period for which the authority is given is unexpired. *Ib.*

13. Such a letter of credit dated and given in this state to a person in Michigan, specifying no place at which the drafts were to be made payable, will not bind the signer to the acceptance or payment of drafts payable in New York; *ISHAM, J. Ib.* (But see *Same plaintiffs v. Pecks*, 200.)

GUARDIAN, *See* PROBATE COURT, 6, 7.

HIGHWAY.

1. The occupation of premises on the line of a highway [for a period of twenty years or more, without any paper title, affords no presumption, as matter of law, that the possessor's title extends beyond the limits of his actual possession or to the centre of the highway. *Hatch v. W. C. R. Co.*, 142.

2. Nor can a person acquire a title to any portion of the highway by an occupancy of it with his wagons and carriages and those of his customers, if such occupancy is not adverse to the rights of the public, or under some other claim of right to the premises as a highway. *Ib.*

3. A petition for the discontinuance of a highway, laid by the selectmen, but not yet built, does not suspend or prevent their immediately proceeding with the building of the highway. *Taft v. Pittsford*, 286.

4. An appeal by a landowner from the laying of a highway vacates the previous orders of the selectmen respecting it, and suspends all their operations and proceedings for the purpose of building a road. *Ib.*

5. A person who has contracted to build a road laid by the selectmen, cannot proceed with his contract after he receives notice of such an appeal, and recover of the town therefor. *Ib.*

6. Nor can he recover upon an order given by the selectmen for work performed after receiving notice of such an appeal. *Ib.*

7. The order counted upon in the present case, *held* to have been given for such work, and not in compromise of a claim for damages for such a termination of the contract. *Ib.*

8. Ornament and the improvement of grounds about a public building, may be taken into consideration and regarded in connection with the convenience and necessity of a proposed highway; but they do not alone constitute a sufficient basis for establishing it. *Woodstock v. Gallup*, 587.

9. Upon a report of commissioners in favor of laying a highway, if the county court do not proceed to consider and determine the case upon its merits, the aggrieved party may, upon a proper application, have a remedy in the supreme court. *Ib.*

10. In an application therefor, a general prayer for such remedy as the court shall deem proper is all that is necessary. *Ib.*

11. The plaintiff having, at the request of the defendant, who was one of the selectmen of the town of Windsor, taken the highway tax-bill of one of the districts in said town, and having made expenditures of labor and money in the necessary repairs of the highways in said district, to an amount largely exceeding all that he was able to collect on said tax-bill, which he had been unable to recover of said town; it was *held* that, upon the facts found and reported, the defendant had assumed and was under no personal liability for the same. *Stone v. Huggins*, 617.

12. The defendant, for the purpose of widening a side-hill highway upon the plaintiff's land, drew stone and dumped them on the lower side of the road so that some of them rolled down against and through the plaintiff's fence into his field. The widening of the road was necessary, and was done in a proper and reasonable manner, with the approval of the highway surveyor. *Held*, that the defendant was not liable to the plaintiff in an action of trespass for so doing. *Morse v. Weymouth*, 824.

HOMESTEAD.

1. The homestead of a deceased person is holden and liable for the same debts which it was before his decease. It is not exempted from debts which accrued before its purchase, or before the first of December, 1860. *Simonds et als., v. Estate of Powers*, 364.

2. The owner of a homestead, having a wife, may convey it by his own deed, without his wife's joining in it, so as to vest in the grantee a superior title to that of a subsequently attaching and levying creditor upon a demand which accrued before the first of December, 1860, and as to whose claim the homestead was not exempted from attachment. *Howe v. Adams*, 641.

3. An appeal lies from the decision of the probate court setting out a homestead to the widow of a deceased person. *True et als. v. Est. of Morrill*, 672.

4. A piece of land which has a dwelling house upon it, occupied by a tenant, but upon which the owner never resided, cannot be treated as his homestead within the meaning of the statute, (Comp. Stat. ch. 86, § 1 and 4,) though he had no other dwelling house, and may have contemplated living upon the premises at a future time. *Ib.*

5. Nor can separate pieces of woodland from which the owner was accustomed to obtain wood for his own use, or a piece of land occupied only by a shop, or a pew in the meeting-house, be regarded as a homestead, or a part of it, within the meaning of said statute. *Id.*

HUSBAND AND WIFE.

1. A husband is liable for property, suitable to his situation and circumstances in life, which is procured by his wife while she is living with him, if, after knowledge of the fact, he permit her to retain it; and especially where the person who furnishes the property has reason to believe, from his previous dealings with the husband, that the wife is authorized to contract for it. *Gilman v. Andrus*, 241.

2. The possession of a piece of land belonging to a feme covert, upon which she and her husband reside, is a possession of the husband alone; and his acts and declarations are admissible for the purpose of showing the character and extent of the possession; — in this case, to show that a piece of land which was fenced and occupied with that of his wife, did not belong to her, but to an adjoining proprietor. *Holton v. Whitney*, 448.

3. The *prima facie* inference that a deed, taken to the wife of the person who pays the consideration for it, was intended as a gift to her, may be rebutted and overcome by parol proof to the contrary; and if this is done, a resulting trust will exist in favor of the husband. *Wallace v. Bowens*, 688.

4. In the present case, the orator having purchased and paid for a piece of land, the deed of which was taken to his wife, and the proof being satisfactory that it was not intended as an absolute gift to her; it was held that there was an implied or resulting trust which a court of chancery would execute in his favor. *Id.*

5. *Sembla.* That if a husband had so taken the deed under a misapprehension as to its legal operation, supposing that it would have the same effect as though taken to himself and his wife jointly, a court of equity would be justified in compelling the parties interested to allow it to have that operation. *REDFIELD, CH. J. Id.*

6. In a deed from a husband and wife, executed while our statute required the acknowledgement by the wife to be made by her separately from her husband, it should appear in the certificate of acknowledgement that it was so acknowledged by her. If it does not, the deed will be inoperative and void, as against the wife. *Pratt v. Battels*, 685.

7. The possession of land taken under a deed from a husband and wife, without a certificate of such an acknowledgement by the wife, will not be adverse to her rights while she remains under coverture. The statute of limitations will commence running against her only from the death of her husband. *Id.*

8. The choses in action of a feme covert, in this state, who dies intestate and without issue, which had not been reduced to possession by her husband, are to be distributed to her collateral heirs, to whom her real estate, if she had any would descend, and not to her husband. *Heirs of Holmes v. Admr. of Holmes*, 765.

9. The fact that such choses in action were all the property that the wife possessed, and that she, before the marriage, so informed her husband, and that he, at her desire, procured her wedding dress and other wedding preparations, and was at the whole expense of furnishing the house, and that, after the marriage, she handed the notes to her husband, who took them and kept them with his other papers, do not constitute a reducing of them to the possession of the husband, or give him any valid lien upon them. *Id.*

See HOMESTEAD 2; POOR 6.

 ILLEGAL CONTRACT.

1. A note is void which is given, either wholly or in part, for the purpose of procuring the suppression of a prosecution for an offence of a public nature, involving moral turpitude, and affecting the public morals and example. *Bowen et al. v. Bush et al.*, 808.

2. A note is also void which is procured by a representation that such a prosecution has been commenced and an agreement to stop it, even if such a representation was false, if it was believed and acted upon by the opposite party. *Id.*

3. If the pretended prosecution was for obtaining goods by false pretences from the payee of the note, it will make no difference, in this respect, as to its validity, that it was given only for the value of the goods obtained, and for only the amount of the debt justly due therefor from the person who obtained them. *Id.*

INDIFFERENT PERSON, *See* JUSTICE 7; PROCESS 3.

INCEST, *See* CRIMINAL LAW 1, 2.

INFANT.

1. A justice judgment against a minor is valid, and cannot be set aside on account of his infancy, if his father and natural guardian was sued jointly with him, and appeared and defended the suit. *Wrisleys v. Kenyon*, 5.

INJUNCTION, *See* CHANCERY 9, 10, 11.

INN-KEEPER.

1. Leaving a horse with an inn-keeper does not render him liable, as such, for the keeping of a bag of gold or other dead property delivered to him by the owner of the horse during the time the horse is kept, if the owner is not personally a guest, and the delivery of the property is a distinct transaction, disconnected in consideration, and in fact, from the delivery and keeping of the horse. *McDaniels v. Robinson*, 887.

INTEREST.

1. Interest upon a debt, payable on demand, will be allowed, after a demand, by way of damage for the delay; and the law will imply a contract to pay it. *Gleason v. Briggs*, 125.

See JURISDICTION 6.

INTOXICATING LIQUOR.

1. The respondent, a citizen of New Hampshire, having his only place of business in that state, there contracted to sell to a resident in this state a part of a cask of brandy, which was then in this state *in transitu* from New York to New Hampshire. The purchaser, by permission of the respondent, obtained the cask from the railroad depot in this state, where it then was, and took it to his residence, where he was to take from it what he wanted and carry the cask with what remained to the respondent's store in New Hampshire, where the quantity taken was to be ascertained by a measurement of that which remained, and be there paid for. *Held*, that this constituted an offence against the act of 1852 to prevent the traffic in intoxicating liquors. *State v. Comings*, 508.

2. The conviction of a person for being a common seller of intoxicating liquor is

a conclusive bar to a prosecution for single acts of sale previous to the filing of the complaint, upon which the conviction for being a common seller was had. *State v. Nutt*, 598.

8. A complaint before a justice that the respondent "did become a common seller of, and at divers times sell, furnish or give away intoxicating liquor," &c., is to be treated as a complaint under the 5th section of the act of 1852, to prevent the traffic in intoxicating liquor; and, upon such a complaint, the justice is empowered, by the 18th section, to adjudge the respondent guilty of being a common seller, and impose the fine specified in the 9th section of said act. *Id.*

JAIL BOND, *See* PLEADING 2.

JAIL COMMISSIONERS, *See* EVIDENCE 21, 22.

JOINDER OF ACTIONS, *See* EXECUTORS AND ADMINISTRATORS 8.

JOINDER OF PLAINTIFFS.

1. The plaintiffs agreed to take jobs of work, and work together, each to be allowed for the time he worked on any particular job, and to hire, as near as possible, equal amounts of help, the profit of which was to be divided between them. The work in question was contracted for, by one of the plaintiffs, with reference to this agreement; and he informed the defendant that he was in partnership, or connected in business with the other plaintiff. *Held*, that it was properly charged, and that a recovery thereof could be had in the name of the plaintiffs jointly. *Sawyer et al. v. Worthington*, 738.

See PRINCIPAL AND SURETY 1.

JOINT ACTION, *See* PRINCIPAL AND SURETY 1, 2.

JUDGMENT.

1. A confession of judgment before a justice of the peace, in pursuance of section 4 of chap. 115, Comp. Stat., operates as a merger of the original cause of action;— and the suit could not, before the act of 1855, (*Laws of 1855*, p. 13,) thereafter proceed against persons summoned as trustees, even though it was expressly understood that the plaintiff should not be thereby prejudiced in pursuing the trustees. *Barnes v. Lapham & Ty.*, 307.

JURISDICTION.

1. A justice has jurisdiction in an action of assumpsit where neither the *ad damnum* or the amount claimed exceeds \$100, though the amount claimed is the balance of an account upon which an action on book might have been sustained, the debtor side of which exceeds \$100. *Bank of Rutland v. Cramton*, 380.

2. A court will obtain jurisdiction as to both of two defendants, if they both appear by attorney and answer to the action, though the writ was served upon but one of them, and a *non est* return was made as to the other. *Blood v. Crandall*, 393.

3. The county court has original jurisdiction in actions of assumpsit, and for the use and occupation of real estate, brought in good faith, where the largest sum of principal, which the plaintiff could have expected to recover, was less, but with interest to the time of trial, amounted to more than one hundred dollars. *Hall v. Wadsworth*, 410.

4. A party having a claim in assumpsit for over \$100, may abandon a portion of

it or reduce it to a sum less than \$100, and thus be enabled to commence and sustain an action before a justice of the peace for its recovery. *Danforth v. Streeter*, 490.

5. An article sold conditionally, to be returned if it did not suit the purchaser and which was so returned, may, though it was regularly charged on the plaintiff's book at the time of its delivery and credited at the time of its return, be wholly omitted from the account; and, if so omitted, will not be treated as a part of the account for the purpose of placing it beyond the jurisdiction of a justice. *Paige v. Morgan*, 566.

6. It is optional with the plaintiff whether or not to claim interest upon an account to which he is fairly entitled; and the jurisdiction of a justice will not be affected by any just claim which he might, but does not make; or which, having made, on the mistaken ground that the justice's jurisdiction would not be exceeded, he abandons. *Ib.*

7. The county court has jurisdiction of an action on the case against an officer for not keeping property attached by him so as to be levied on, though the judgment obtained be for less than one hundred dollars, if the damages demanded and actually recovered, including interest to the time of trial, exceeds that sum. *McK Ormsby v. Morris*, 711.

See CHANCERY 12; PROBATE COURT 5.

JUSTICE OF THE PEACE.

1. The judgment of a justice cannot be set aside by *audita querela* on account of his having refused to continue the cause when the defendant was sick and unable to attend a trial. *Amidon v. Aiken*, 440.

2. An action pending, and on trial by a jury, on the 30th day of November, before a justice of the peace whose term of office expired on that day, was proceeded with, by the agreement of the parties, until 6 o'clock on the morning of the 1st of December, when the jury failed to agree; and the ex-justice took no further cognizance of the cause, and neither party caused a new justice to be substituted in his place. *Held*, that the defendant therein could not maintain an action against the plaintiff for the taxable costs to which he had been subjected in his defense of the suit. *Johnson v. Kingsbury et al*, 486.

3. A party having a claim in assumpsit for over \$100, may abandon a portion of it or reduce it to a sum less than \$100, and thus be enabled to commence and sustain an action before a justice of the peace for its recovery. *Danforth v. Streeter*, 490.

4. A justice of the peace after deciding, upon the motion of the defendant, to continue a cause pending before him, may, at the same sitting, permit the plaintiff to discontinue the suit. *Flint v. Whitton*, 557.

5. The supreme court will not ordinarily interfere by writ of *quo warranto*, or otherwise, to prevent a person from holding the office and exercising the powers of a justice of the peace while he has the appointment of, and is acting as a postmaster. *State v. Fisher*, 714.

6. If they would, the present proceeding could not be sustained, there being no proof that the respondent has acted as postmaster during the year for which he has been elected a justice. *Ib.*

7. The alteration of the return day of a justice writ, so as to make it returnable at a later day than the one appointed at the time the writ was signed, will not extend

the previous authorization of an indifferent person to serve the writ beyond the time within which it should have been originally served, if such alteration is made without the concurrence of the justice. *Carr v. Tyler*, 788.

See JUDGMENT 1; JURISDICTION 1, 5, 6; TRUSTEE PROCESS 7.

LADING, (BILLS OF,) *See* BILLS OF LADING.

LAKE CHAMPLAIN.

1. Lands bounded on Lake Champlain extend to the edge of the water at low water mark. The same rule applied, in this case, to lands near the lake bounded on a creek emptying into, and the waters of which ordinarily maintain the same level, and rise and fall with those of the lake; there being no claim made that the boundary should extend to the centre of the creek. *Fletcher v. Phelps*, 267.

LANDLORD AND TENANT.

1. The lessor of a farm, who stipulates in his lease that the crops shall be consumed on the place and remain his property until certain conditions are performed, may, if a portion of the crops are sold by the lessee, and removed from the farm in violation of the stipulation, sustain an action of trespass against the lessee and the purchaser who removed them. *Gray v. Stevens et al.*, 1.

2. The purchaser, though he acts innocently, and in ignorance of the lessor's rights, will be equally liable with the lessee. The lessee stands in no such relation that he can convey any greater right to the property than he himself possesses. *Ib.*

3. The rule of damages in such case is the value of the property removed. *Ib.*

4. *Held*, upon the facts found by the referee, that the tenancy of the defendant in the present case was a tenancy from year to year. *Hall v. Wadsworth*, 410.

5. In a tenancy from year to year, the tenant cannot quit at pleasure, without notice, and deprive the landlord of accruing rent. The landlord's right to notice is, to some extent, at least, reciprocal to that of the tenant's. *Ib.*

6. The defendant leased of the plaintiff on the 27th of November, 1849, a dwelling-house, and occupied it thereafter as tenant, from year to year, until the 10th. of November, 1852, when he quit, having given only two weeks previous notice of his intention to do so. *Held*, that he was liable for the rent to the 1st of April thereafter, the plaintiff making no claim for it beyond that time. *Ib.*

7. A conveyance of real estate, with covenants of warranty, to a person, his heirs and assigns, as long as wood grows and water runs, in the form of a lease, but reserving only a nominal rent if demanded, and without reserving any right of re-entry, is, in effect, a conveyance of the fee; and does not create such a tenancy as, upon a repudiation of it, would require notice to be given to the grantor. The object of a notice of the repudiation of a tenancy being required is to enable a landlord to protect his rights; but under such a conveyance, the conveyer would have no rights to protect. *Propagation Society v. Sharon et als.*, 608.

8. A provision, in a lease of a farm upon shares, that the produce is to be at the control of the lessor until sold, will enable the lessor to hold the crops raised on the place against an attachment of them by a creditor of the lessee, until they are divided or sold, or all the stipulations on the part of the lessee are performed, for the security of which the provision was made. *Edson v. Colburn*, 681.

9. If the rights of the lessee, under such a lease, to a part of the crops deposited

in the barn upon the farm occupied by him, are sold and transferred to the lessor, upon a settlement between them, no removal of the property or change in its possession will be necessary to perfect the lessor's right to it. *Ib.*

10. An agreement, by the tenant or occupant of a piece of land, that the owner of the land, or one who has a right to it superior to his, shall own and be entitled to the crops to be raised thereon, is valid, and will enable the landlord to maintain an action of trover for them against an attaching creditor of the tenant, or one who purchases them of him with notice of the landlord's right. *Leland v. Sprague*, 746.

LETTER OF CREDIT, *See* GUARANTY 10 to 12.

LESSEE, *See* LANDLORD AND TENANT; RAILROAD 11.

LESSOR, *See* LANDLORD AND TENANT.

LIEN.

1. To give a factor a lien upon goods consigned to, but not actually received by him, the consignment must be to him in terms, and he must have made advances or acceptances upon the faith of it. *Davis & Aubin v. Bradley & Co.*, 118.

2. B. & H. B. delivered to the defendants, who were storage and forwarding merchants, several sacks of wool, for which the defendants gave receipts, specifying that they were for the plaintiffs, or to be forwarded to the plaintiffs. These receipts were sent to the plaintiffs, and they, upon the credit of, and with reference to said wool, accepted drafts drawn upon them by B. & H. B. *Held*, that the plaintiffs thereby obtained the constructive possession of the wool, and had a lien upon it for the amount of their acceptances. *Ib.*

LIMITATIONS.

1. The statute of limitations does not commence running against a foreign corporation until they have attachable property in this state, although, previous to that time, there may be directors and stockholders of such corporation residing in the state. *Hall v. Ft. & Mass. R. Company*, 401.

2. If a partner, who is the agent of the firm for making disbursements, &c., make a payment, as such agent, upon a promissory note previously given by the firm, it will be presumed to have been made out of the partnership funds, and will prevent the running of the statute of limitations against all the partners. Such a payment is to be treated as a payment by all of the firm on their joint account, and not as that of the paying partner only. *Carlton et al. v. Ludlow W. Mill*, 504.

3. An assurance given by the defendant, upon receiving a note from the plaintiff, that it could be arranged by the taxes the defendant was owing him, and that within the year for which the note was given they would get together and have it settled, would, if given within six years, prevent the operation of the statute of limitations. *Bowman v. Downer*, 552.

4. Neither the individual admissions of the members of a corporation, established for public purposes and for the promotion of the private interests of the corporators, nor the personal admissions of its president, or of the individual members of its executive committee, respecting a debt due from the corporation, will prevent the operation of the statute of limitations upon it. *Lyman v. Norwich University*, 560.

5. An acknowledgment of an indebtedness must, to prevent the operation of the statute of limitations, be unaccompanied with the expression of an unwillingness and refusal to pay it. *Aldrich v. Morse*, 642.

6. In the present case, the defendant paid one of two joint owners of the demand a specified sum for his half, saying that was all he could afford to pay, and that he would give the same for the other half, but would not give any more. *Held*, insufficient to prevent the operation of the statute of limitations. *Ib.*

7. A mutual agreement between two persons that they will take no advantage of the statute of limitations having run upon the other's claims, but that they will thereafter settle without objection on that account, will prevent the operation of that statute; and the expression of the opinion, by one of them, that there will not be anything due from him on such a settlement, will have no effect. *Noyes v. Estate of Hall*, 645.

8. Notes held by one party against the other, would be included under the term "claims," in such an agreement. *Ib.*

9. The possession of land taken under a deed from a husband and wife, executed while our statute required the acknowledgment by the wife to be made by her separately from her husband, without a certificate of such an acknowledgment by the wife, will not be adverse to her rights while she remains under coverture; and the statute of limitations will commence running against her only from the death of her husband. *Pratt v. Estells*, 685.

10. A declaration of the defendant that, if he owed the plaintiff anything he was willing to pay him, *held* sufficient, upon the indebtedness being proved, to prevent the operation of the statute of limitations, although the defendant, at the same time, claimed that he did not owe the plaintiff anything, and that it was his impression that he had paid the demand in question; the claim, in connection with the impression, evincing no unwillingness to remain liable, if the fact of payment should be found against him. *Steele v. Towne*, 771.

11. Mere absence from the state will not prevent the operation of the statute of limitations while the debtor retains a residence in it by which process may be served upon him. *Hall v. Nasmith*, 791.

12. If the debtor has his fixed residence out of the state, all of his absences from the state are to be deducted from the time during which the statute of limitations would otherwise be running. *Ib.*

13. A replication, to a plea of the statute of limitations, that before the statute had run to wit, from January 1, 1843, to the commencement of the suit, the defendant was absent from and resided out of the state, does not assert a continuing absence, or an absence, construing the averment against the pleader, for more than a single day. *Ib.*

14. A rejoinder to such a replication that within the time mentioned the defendant was frequently in this state to the knowledge of the plaintiff, *held* sufficient. *Ib.*

MAINTENANCE.

1. The terms *maintenance* and *champerty* not applicable to *bona fide* purchases of rights of action;—and, *quære*, whether these offences, as they existed at common law, are recognized in this state. *Danforth v. Streeter*, 490.

MANDAMUS.

1. The proper office of, and proceedings upon writs of *certiorari* and *mandamus* in the nature of a *procedendo* considered. *Woodstock v. Gallup*, 687.

MARRIAGE.

1. A marriage annulled on the ground of fraud, where it appeared that the petitioner was imposed upon, and the marriage brought about by the authorities of the town, to which she was chargeable as a pauper, by their hiring the petitionee, whose settlement was in a different town, to consent to the form of a marriage without afterwards fulfilling or intending to fulfill its obligations, and with no other object except to impose upon the town of his settlement the expense of the petitioner's maintenance. *Barnes v. Wyethe*, 41.

MARRIED WOMAN, *See* HUSBAND AND WIFE.

MASTER AND SERVANT.

1. A master is bound to exercise proper care and diligence in the selection of the agencies and instruments with or upon which he employs his servant; and, if he fail to do so, he will be liable to the servant for any injuries he may sustain therefrom. *Noyes v. Smith & Lee*, 59.

2. The declaration averred that the plaintiff was hired by the defendants to have the charge of, and conduct and run an engine, and that, by virtue of said employment, it became the duty of the defendants to furnish an engine that was well constructed and safe, &c., but that they carelessly and wrongfully furnished an insufficient engine; that the insufficiency was unknown to the plaintiff, and "but for want of all proper care and diligence would have been known to the defendants;" and that, while the plaintiff was in the careful and prudent use of said engine, it exploded on account of said insufficiency, and injured the plaintiff, &c. *Held*, on demurrer, that the declaration disclosed a sufficient cause of action. *Id.*

3. A person is not liable for injuries occasioned by the acts or neglect of the servants of one who has contracted to do a piece of work for him by the job. *Clark v. Ft. & Canada R. Co.*, 108.

4. The liability of a master for the acts of his servants grows out of, and is measured by the control of the former over the latter; and for the want of such control the principal will not ordinarily be liable for the acts or neglects of the employees of a sub-contractor under a contractor employed by him to do a specified work. *Pawlet v. R. & W. R. Company*, 297.

5. The defendants contracted with P. & E. to construct certain sections of their railroad; and they sub-contracted with C. to erect certain abutments thereon. A servant of C., in drawing stone for such abutments, left one in the highway, by reason of which one P. was injured, and recovered of the plaintiffs for the damage sustained by him. In an action to recover of the defendants the damages to which the plaintiffs were so subjected, it was *held*, that the defendants had no control over the servant of C., and that no privity existed between them; and that the defendants were therefore not liable. *Id.*

6. *Quere*, as to the present authority of *Bush v. Steinman*, 1 B. & P. 404, and the cases founded upon it. *Id.*

MINOR, *See* INFANT.

MORTGAGE.

1. It is no defense to an action on a promissory note that its consideration, in part, was a piece of land conveyed to the maker, by the payee, by a warranty deed; and that the land was incumbered by a mortgage which the grantee has since paid. *Hassam v. Dompier*, 82.

2. A person who is substituted in place of a mortgagee may, if equity requires it, be limited, and have allowed to him a less extensive right than that to which the mortgagee himself would have been entitled. *Bailey v. Warners*, 87.

3. A mortgagee cannot be compelled to rely upon a part only of the mortgaged premises, though that part may be adequate security for his claim, but one substituted in his place may be, if equity requires it. *Ib.*

4. Distinctions between a mortgage and a pledge of personal property. Application of these distinctions, &c. *Conner v. Carpenter*, 237.

5. Equity will not allow a grantor of real estate to recover the whole purchase money, while there are incumbrances on the land, which he is bound to discharge: the purchaser will be permitted to retain of the purchase money sufficient to indemnify him against the incumbrances, particularly if the grantor is insolvent, and there is no adequate remedy on his covenants. *Bowen v. Thrall et als.*, 882.

6. The orator purchased of the defendant J., an undivided half of a certain saw-mill, &c., which J. agreed to convey to him by a warranty deed, containing the usual covenants of seizin and against incumbrances. The deed given conveyed only J.'s "right, title and interest in" the premises, and contained no covenant except one to warrant and defend the "aforesaid premises." The premises were incumbered by a mortgage previously given by J., by virtue of which the mortgagee subsequently took and held possession, and the defendants were endeavoring, by an action at law, to collect a note given by the orator towards the purchase money. *Held*, that the deed executed was not conformable to the contract, and that the orator was entitled to an injunction against the collection of the note, until the mortgage incumbrance was removed, and a deed given agreeable to the contract. *Ib.*

7. An action upon a bond and mortgage taken by a banking institution, organized under the general banking law of 1851, and assigned by them to the treasurer of the state, in pursuance of the seventh section of that law, cannot be maintained in the name of the banking institution, until it is re-assigned by the treasurer as provided in the ninth section of the same law. *South Royalton Bank v. Downer et al.*, 685.

8. The orator in the present case having a mortgage for his support, the condition of which had not been performed, had retaken possession of the premises, and for several years supported himself;—*held*, entitled to a decree quieting in himself the absolute title in the premises. *Frizzle v. Dearth et als.*, 787.

See EJECTMENT 2.

NEGLIGENCE.

1. The question of negligence may, in some cases, be withdrawn from the consideration of the jury, as where there is no testimony tending to show it; or where a given course of conduct is admitted which results in detriment, and no excuse is given. In the latter case the liability follows, as matter of law, and there is nothing for the jury but a question of damages. *Briggs v. Taylor*, 180.

2. Where a carriage, wagons and sleighs, which were not past use, were attached and were allowed by the officer to remain during a winter in the open fields, wholly exposed to the weather, for which no excuse was offered except the difficulty of finding a place for them under cover, the jury should have been instructed that the officer was liable for the damage done to the property; and it was error to submit to the jury the question whether or not the officer exercised proper care. *Ib.*

NEW TRIAL.

1. A new trial for the alleged reason that a juror had, previous to the trial, formed and expressed an opinion, *refused*; there being but the oath of one witness to the fact against that of the juror; the alleged opinion being upon a matter of law; and it appearing that, if the juror had formed or expressed an opinion, he was not conscious of it at the time of the trial. *Thrall v. Lincoln*, 856.

See PRACTICE 7.

NON EST INVENTUS RETURN, *See JURISDICTION 2.*

NUISANCE.

1. No action on account of a public nuisance can be sustained by a person who has not sustained special damage from it. *Hatch v. W. Central R. Company*, 142.

OFFICIAL NEGLIGENCE.

1. One T. sent to the plaintiff, as deputy sheriff, an execution in his favor against the defendant, which, at the defendant's request, and upon his promise to pay and indemnify him for so doing, the plaintiff levied upon the defendant's real estate. T. sued the plaintiff for not otherwise collecting the execution, and recovered a judgment against him for the amount of the debt, which judgment the defendant paid. T. refused to pay the plaintiff's fees for levying the execution, and the plaintiff then charged them to the defendant. *Held*, that it was not a contract for the violation by the plaintiff of his official duty, and that the defendant was liable upon his promise for the fees charged. *Gleason v. Briggs*, 135.

ORDER, (TOWN,) *See HIGHWAY 6, 7.*

PARTITION, (PETITION FOR.)

1. A petition for partition cannot be maintained by one whose only title is under a deed by which the grantor, who is still living, reserves to himself the use and occupation of the premises during his life. *Nichols et al. v. Nichols et al.*, 228.

2. A petition for partition is not a civil cause within the meaning of the statute allowing reviews. Comp. Stat. chap. 28, § 17, (but repealed by No. 51 of the laws of 1866.) *Id.*

3. To sustain a petition for partition the petitioner must have some greater present interest in the premises than a mere right of entry. If the defendant's possession amounts to a disseizin of the petitioner, and the premises were never held by them together, a petition for partition cannot be sustained. *Brock v. Eastman*, 658.

4. The petitioner had levied upon an undivided portion of the defendant's interest in a piece of land, which the defendant remained in possession of, denying the petitioner's right to any participation therein under his levy. *Held*, that the defendant's possession of the premises was not such a seizin of them, as tenant in common with the petitioner, as would enable the latter to sustain his petition for partition. *Id.*

PARTNERSHIP.

1. If the creditor of a partnership takes the note or bill of exchange of one member only of the firm in satisfaction of his claim, he thereby discharges the others. *Stephens v. Thompson et al.*, 77.

2. Upon the dissolution of a co-partnership, one of the partners promised to pay a debt due from the firm, but failed to do so. The other partner, for the purpose of having it collected from the one who had promised to pay it, induced his brother to become the purchaser of it, and made an arrangement himself with the creditor by which it was assigned, without recourse, to his brother upon his paying the full amount due upon it. *Held*, that the debt was not thereby extinguished, and that a recovery might be had upon it for the benefit of the assignee. *Etna Ins. Co. v. Wires & Peck*, 98.

3. The one to whom the promise was made became thereby, as between himself and his copartner, a mere surety, and if he had himself furnished the money with which the demand was purchased, *quære*, whether the original debt might not have been still kept on foot for his benefit. *Ib.*

4. A provision, in articles of co-partnership, that one of the partners is not to be liable for any purchase made by the firm on credit, is valid and operative, and will prevent a recovery against him, on account of such a purchase, if the person of whom it is made is informed, or has knowledge of the provision. *Hastings et als. v. Hopkinson et al.*, 108.

5. The liability of a partner, and the power of the other members of the firm to bind him, by a purchase of goods on credit in the state of New York, is to be determined by the laws of this state, if the partnership was formed, and its business carried on here. *Ib.*

6. The provisions and conditions of written articles of co-partnership cannot be proved by parol by the copartners themselves who have the original articles in their possession, or under their control. And in this case where the plaintiffs were seeking to charge the defendants as copartners, and had given them notice to produce the written articles, and upon their neglect to do so had introduced depositions of a witness tending to prove such a partnership, *it was held* that a further deposition of the same witness, taken by the defendants in reference to the contents or provisions of those articles, was inadmissible, either as a cross-examination upon, or as a continuation of the testimony contained in the other depositions. *Ib.*

7. Where a change takes place in a copartnership by the addition of a new member to the firm, and the balance of an account against a customer, which accrued before the change, is carried forward and treated as a part of the account of the new firm, to whom payments are made, which are applicable to their account generally, the payments so made, if the rights of third persons or sureties are not involved, will be applied in satisfaction of the old balance, and not of the account accruing while the payments are being made. *Morgan et als. v. Tarbell*, 498.

8. To prove that a person was a member of a firm, testimony showing that he had a deed of an undivided portion of their property, and that, with his knowledge, suits at law and in chancery respecting said property were instituted by and in the name of the firm in which he was joined as plaintiff, and that he took an active part in advising about, and in making repairs upon said property, is admissible. *Carlson et al. v. Ludlow W. Mill*, 504.

9. If a partner, who is the agent of the firm for making disbursements, &c., make a payment, as such agent, upon a promissory note previously given by the firm, it will be presumed to have been made out of the partnership funds, and will prevent the running of the statute of limitations against all the partners. Such a payment is to be treated as a payment by all of the firm on their joint account, and not as that of the paying partner only. *Ib.*

10. Where the persons summoned as trustees are summoned only as partners, the effects or credits in the hands of one of them individually are not attached and cannot be holden. *Coverly & Co. v. Braynard & Tr.*, 788.

11. An order upon a firm for the credits which the drawer has in the hands of the firm or of any of its members, and an acceptance of it by one of the partners who has the special management and liquidation of the business and debts subsisting between the drawer and the firm, held to bind such partner individually. *Prentiss v. Foster*, 742.

PARTY.

1. A promissory note was allowed against the estate of the payor, in the name of "Andrew T. Hall, President of the Tremont Bank." Held, that the allowance in his name was no defense to a proceeding against the endorser, in the name of the Tremont Bank. *Tremont Bank v. Estate of Paine*, 24.

2. The witness law of 1862 (Laws of 1862, p. 11,) contemplated the examination of a party as a witness only in open court, and did not authorize the using of his deposition. *Admr. of Sheldon v. Griswold*, 876. (But see Laws of 1866, p. 12.)

3. A party is not obliged, as a witness, to disclose any consultation he may have had with his counsel in relation to the cause. He is equally protected, with his counsel, from testifying respecting confidential communications between them. *Hemmeway v. Smith et al.*, 701.

See ACTION 3, 4; DEPOSITION 1.

PAUPER, See POOR.

PAYMENT.

1. A promissory note, given upon an open account, when, and how far operating as a payment. *Dickinson v. King*, 378.

2. A note, given only as collateral, will not operate as a payment, though the creditor has negotiated and obtained the money, and a judgment in favor of the endorsee against the maker has been rendered upon it, if the judgment remains unsatisfied and the claim of the endorsee has been provided for, by the creditor, in some other way. *Ib.*

3. Upon a partial settlement, the amount of the intestate's account was ascertained and a due-bill given for it, which included items which the plaintiff had previously paid to a third person who was authorized to receive it. Held that the fact of such a previous payment might be shown, and that its effect was, not to vary the operation of or contradict the due-bill, but to establish a valid offset to so much of it. *Noyes v. Est. of Hall*, 645.

4. Articles delivered strictly in payment or part payment of a note, if they are not applied, and the whole note is subsequently otherwise paid, cannot be recovered for in an independent action; but if, at the time of their delivery, it is understood that there is to be a future adjustment in reference to them before their application, and the note is subsequently paid before such an adjustment, and without any application of them, they may then be independently recovered for. *Cushman v. Estate of Hall*, 656.

5. In the present case 125 bushels of potatoes, which, it was understood, were to be endorsed on the note, were delivered in different parcels and at different times,

and the holder of the note entered the different parcels or loads upon his book, as they were received. *Held*, that this tended to show that an application on the note of each load as received was not intended, and that an adjustment and application was to be made after the whole were delivered. *Ib.*

See EXECUTORS AND ADMINISTRATORS 6; LIMITATIONS 2; PARTNERSHIP 7, 9; PROBATE COURT 1.

PERSONAL PROPERTY.

1. A person's choses in action would be included in a conveyance of all his personal property of every name or nature. *Sherman, Admr. v. Est. of Dodge*, 38.

2. The right of the owner of personal property to reclaim it, if he can identify it, does not exist when the property has been annexed to another person's freehold and become a part of the realty. *Jackson v. Walton, Tr.*, 43.

3. Distinctions between a mortgage and a pledge of personal property. Application of these distinctions, &c. *Conner v. Carpenter*, 237.

DISTRIBUTION OF. See HUSBAND AND WIFE 8; PROBATE COURT 6, 8, 9; WIDOW 6, 6.

PEW.

1. A pew in a meeting-house is real estate. *Hodges & wife v. Green*, 358.

2. But it is no part of a homestead. *True et als. v. Estate of Merrill*, 672.

PLEADING.

1. In an action of trespass for taking property, the defendant plead the organization and existence of a school district, the warning and holding of a school meeting, the voting of a tax, the plaintiff's liability therefor, its assessment by the prudential committee, the issuing and delivery to the defendant of a warrant for the collection of the tax, his proceedings in taking the plaintiff's property, as collector, by virtue of the tax bill and warrant, &c.;—to which the plaintiff replied that the supposed tax "was not legally and duly assessed by the then prudential committee of said school district upon the lists of said district." *Held*, upon special demurrer, that a single issue was thereby presented, and that the replication was sufficient. *Moss v. Hindes*, 279.

2. A declaration upon a jail bond, given upon an arrest on mesne process, is defective and insufficient on demurrer, if it contains no averment that the person arrested was imprisoned in jail at the time of giving the bond. *Gregory v. Thrall*, 306.

3. An averment, in pleading, that John J. Crandall became bail, by endorsing his, the said Crandall's name of J. J. Crandall, on the writ, &c., is equivalent to an averment that he endorsed the writ by the name of J. J. Crandall, and that this name is identical with that of John J. Crandall. *Blood v. Crandall*, 386.

4. A declaration in *scire facias*, against bail, is insufficient if it shows that the defendant in the original action, (being an action *ex contractu*,) was a resident of one of the United States, and it is not averred that he was not a citizen, or that an affidavit was filed as the reason for the issuing of the process against his body. *Ib.*

5. A declaration sustained on motion in arrest, though it would have been defective on demurrer, and there were material variances between it and the proof, on which account, however, no objection was made. *Brown v. Hitchcock*, 453.

6. The general issue in actions of tort, though, in form, joint, is regarded as a several plea. *Downer v. Flint et al.*, 527.

7. In an action on the case against an officer for not keeping property attached by him so as to be levied on, it should appear from the declaration that the property was charged by execution within thirty days from the rendition of the judgment, and a declaration is insufficient, on demurrer, if it only appears from it that the judgment was rendered at a term of the court commencing March 23d, and that execution issued dated March 29th, and that it was in the officer's hands on the 26th of April following;—it not appearing at what time the court adjourned, and there being no intendment from the date only of the execution that it issued at the earliest period that it might. *McK Ormsby v. Morris*, 711.

8. An averment, in a writ of *audita querela*, that the complainant, believing that the suit would not be entered in court, did not attend to defend the same, and that thereupon the defendant fraudulently procured judgment by default, *held*, after verdict, as equivalent to an allegation that the complainant absented himself from the trial under the expectation and confidence that the suit was to be discontinued, and that the defendant, knowing that he acted upon that confidence, procured the judgment by default. *Perkins v. Cooper*, 729.

9. A replication, to a plea of the statute of limitations, that before the statute had run to wit, from January 1, 1848, to the commencement of the suit, the defendant was absent from and resided out of the state, does not assert a continuing absence, or an absence, construing the averment against the pleader, for more than a single day. *Hall v. Nasmith*, 791.

10. A rejoinder to such a replication that within the time mentioned the defendant was frequently in this state to the knowledge of the plaintiff, *held* sufficient. *Ib.*

See EXECUTORS AND ADMINISTRATORS 2; MASTER AND SERVANT 2; SCIRE FACIAS 3.

PLEDGE, See MORTGAGE 4.

POOR.

1. A precept, in due form, warning a person to depart the town under the law of 1801, and the return of a sufficient service of it was copied upon the book of records in the town clerk's office. An attestation in the following words, "received this warning on record," properly dated and signed by the town clerk, made at the lower left hand corner of the precept, but above the return, was held to refer to and include the return as well as the precept. *Salisbury v. Middlebury*, 282.

2. The word warning, as used in the attestation, included both the precept and the service of it. *Ib.*

3. A legal settlement could be obtained by one year's continuous residence in a town in this state, between the years 1779 and 1787, and a settlement acquired in that way by a father, would be communicated to his minor children. *Londonderry v. Andover*, 416.

4. And a derivative settlement so obtained by a son, would be communicated to his children afterwards born out of the state, and while he was residing out of the state, if, during their minority, he removes them into the state. *Ib.*

5. But if the father, after obtaining such a settlement, had removed to a foreign country where his children were born, and from which he did not return during their minority; *Quærs*, as to the children having their father's settlement upon their subsequent removal into this state. *Ib.* and see *Lyndon v. Danville*, 809.

6. If, in an order of removal of a man, a particular woman be named as his wife and is ordered to be removed with him, such order will, if not appealed from, be conclusive against the town to which they are ordered to be removed as to the existence of the relationship of husband and wife between them. *Chester v. Wheelock*, 554.

7. And the order will be as conclusive, in this respect, when a copy of it is duly served as provided by statute, as when the paupers are actually removed. *Ib.*

8. An alien born does not have the settlement in this state which his father once had, if, before his birth, the father removed into the foreign jurisdiction where the child was born and never afterwards returned from it. *Lyndon v. Danville*, 809.

POSSESSION.

1. The occupation of premises on the line of a highway for a period of twenty years or more, without any paper title, affords no presumption, as matter of law, that the possessor's title extends beyond the limits of his actual possession or to the centre of the highway. *Hatch v. Vt. C. R. Co.*, 142.

2. Nor can a person acquire a title to any portion of the highway by an occupancy of it with his wagons and carriages and those of his customers, if such occupancy is not adverse to the rights of the public, or under some other claim of right to the premises as a highway. *Ib.*

3. The recognition by the proprietors of adjoining lots of a particular line as their division line, and their acquiescence in it for a period of fifteen years, will establish it, and make it thereafter binding, if, during that time, either proprietor had a continued, though it was only a constructive possession of his lot. *Clark v. Tabor*, 222.

4. If adjoining proprietors recognize a particular line as their division line, but by agreement, build their division fence where it is most convenient, without endeavoring to place it on the line, a part of it being on one side and a part on the other, and agree that when the land is cleared up the fence shall be put upon the line, a mere occupation by either proprietor to such fence for a period of fifteen years, would not establish the irregular line upon which the fence was built;—but would establish the line indicated by the general direction of the fence which the parties recognized and had in mind at the time the fence was built. *Ib.*

5. In a case resting upon prior possession, a lapse of fifteen years or more between the different acts is not conclusive evidence of the abandonment of the first possession. Whether abandoned is a question of fact for the jury, which they may or may not find from the claimants having allowed so long a time to intervene. *Patchin v. Stroud*, 394.

6. The possession of a piece of land belonging to a feme covert, upon which she and her husband reside, is a possession of the husband alone; and his acts and declarations are admissible for the purpose of showing the character and extent of the possession; — in this case, to show that a piece of land which was fenced and occupied with that of his wife, did not belong to her, but to an adjoining proprietor. *Holton v. Whitney*, 448.

7. A title to lands granted to the society for the propagation of the Gospel in foreign parts can be acquired by fifteen years adverse occupancy, since the passage of the act of 1832, (Laws of 1832, p. 4, Thomps. Comp. 57,) repealing all acts exempting persons beyond seas from the operation of the statute of limitations. *Propagation Society v. Sharon et als.*, 603.

8. The occupancy of a person in possession at the time of the passage of that act,

under a warranty deed from a person who derived his title by a perpetual lease from a town claiming and acting under the law of 1794, directing the appropriation of lands granted to that society, was a possession adverse to the title of the society, even though he might, notwithstanding his warranty deed, have been estopped from setting up any title adverse to the town. *Ib.*

9. A constructive possession limited to the bounds given in the deed under which the party claimed, and not extended to an old line beyond, to which, for a part of the distance, there had been more than fifteen years of actual occupancy. *Shedd v. Powers*, 652.

See LANDLORD AND TENANT 9; SALE 2, 3.

POSTMASTER, See JUSTICE 5, 6.

PRACTICE.

1. Upon exceptions to a decision of the county court in reference to the liability of a person summoned as a trustee, by which his disclosure is made a part of the case, and no evidence appears to have been introduced in contradiction of it, the statements contained in the disclosure will be regarded as facts found by the county court. *Merrill et als v. Englesby, Tr.*, 150.

2. The question of negligence may, in some cases, be withdrawn from the consideration of the jury, as where there is no testimony tending to show it; or where a given course of conduct is admitted which results in detriment, and no excuse is given. In the latter case the liability follows, as matter of law, and there is nothing for the jury but a question of damages. *Briggs v. Taylor*, 180.

3. Where a carriage, wagons and sleighs, which were not past use, were attached and were allowed by the officer to remain during a winter in the open fields, wholly exposed to the weather, for which no excuse was offered except the difficulty of finding a place for them under cover, the jury should have been instructed that the officer was liable for the damage done to the property; and it was error to submit to the jury the question whether or not the officer exercised proper care. *Ib.*

4. A party is entitled to a charge as to the legal result of such a state of facts as claims exists, and his testimony tends to prove. *Clark v. Tabor*, 222.

5. If, upon a trial by jury, all the facts alleged in an insufficient declaration are proved, the court may, in their discretion, allow a verdict for the plaintiff, leaving the defendant to move in arrest of judgment, or at once direct a verdict for the defendant. *Amidon v. Aikie*, 440.

6. Upon an information for a writ of *quo warranto* charging the defendants with having usurped offices which they are in possession of, the presumption is that they were regularly elected, and entitled to hold them until the contrary is shown. The applicants, therefore, being bound to make a case against them, should go forward in the proof and in the argument. *State ex rel. Danforth et als v. Hutton et als*, 594.

7. The construction of a deed should not be submitted to the decision of the jury without limitation or restriction or specific instruction in reference to it. But if it is, and they give it a correct construction, a new trial will not be granted. *Morse v. Weymouth*, 824.

PRINCIPAL AND AGENT, See AGENT; MASTER AND SERVANT 3 to 6.

PRINCIPAL AND SURETY.

1. A joint action may be maintained by two several sureties against their princi-

pal, if the demand upon which they were sureties was taken up or discharged by their joint note, or with money obtained upon such a note. *Whipple et al. v. Briggs*, 66.

2. Where such a joint right of action exists, money received by either surety upon securities given to indemnify him for his liability for the principal, will ensure to the equal benefit of his co-surety, and he, *pro tanto*, a satisfaction of their claim against the principal. *Id.*

3. A surety has an equitable interest in his own indebtedness to his principal, arising from the implied contract of the principal to see him indemnified, which has relation back to the time of his becoming surety, and will prevail over any counter equity of a subsequent date. *Barney v. Grover*, 391.

4. A person will not be holden to an assignee for a debt due from him to the assignor, if he was liable, in an equal or greater amount to another person, as surety for the assignor, which he has since paid, though he had not at the time of the assignment. *Id.*

5. A surety is not entitled to an allowance of a claim against the estate of his principal for money paid by him for and as the surety of the deceased, if, with his consent, there has already been an allowance of the same claim against the estate in favor of his co-surety. *Lampson v. Hobart's Estate*, 697.

PROBATE COURT.

1. The mere allowance of a promissory note as a valid claim against the estate of its deceased payor, is no defense to an action upon it against an endorser. Nor will an order of the probate court for the payment of a dividend upon the note and other claims allowed against the payor's estate operate, before an actual payment, as a satisfaction *pro tanto*. *Tremont Bank v. Estate of Paine*, 24.

2. No appeal lies from the report of the commissioners upon a deceased person's estate that a contingent claim was presented. An appeal only lies from its allowance or disallowance. *Hobart v. Herrick*, 637.

3. A creditor of an estate has the right of appealing from the allowance of a claim in favor of another creditor when the administrator declines to do so. And such declinature would probably be inferred, if no claim of the administrator to prosecute the appeal in his own behalf should be interposed. *Id.*

4. Sufficiency and requirements of the bond to be given by the appealing creditor in such a case. *Id.*

5. The jurisdiction of a probate court, in granting administration, cannot be collaterally attacked. *Abbott, Admr. v. Coburn & wife*, 663.

6. Notice must be given to all persons interested in the distribution of an estate, or in an apportionment of an undivided fund, in the hands of a guardian, belonging to two or more of his wards, of any proceedings before the probate court making such a distribution or apportionment; or altering or modifying one previously made. *Stone v. Estate of Peasley*, 716.

7. The proceedings of the probate court in the present case, in revising their previous determination as to the proportion of an undivided fund in the hands of a guardian, which one of the two wards of such guardian was entitled to, held invalid

on account of there having been no notice of the proceeding given to the representatives of the other ward who had previously deceased. *Ib.*

8. *Quare*. Whether a decree of the probate court for the distribution of an estate can be altered or modified after it has been carried into effect. *Ib.*

9. A probate court distributed an estate exclusively to the heirs of the full blood, taking no notice of the half blood heirs, who were, in law, equally entitled to their proportion. *Held*, that the title to the estate was beyond the control of the probate court, after the full blood heirs had taken possession, in pursuance of the decree. — *v. —*, Orleans county, cited by REUFIELD, CH. J. *Ib.*

10. Distinction between such cases and those in which the probate court have reviewed and revised the settlement and allowance of an administrator's account;— and the ground of the proceeding in the latter class of cases considered. *Ib.*

11. Circumstances under and from which the granting, by the probate court, of an order or license to an administrator to sell real estate, and the regularity of the proceedings of the probate court, and of the administrator, in reference thereto, may be presumed, in the absence of any original or record evidence respecting it. *Doolittle et al. v. Holton*, 819.

See HOMESTEAD 2; WIDOW 1, 4.

PROCEDENDO, See MANDAMUS.

PROCESS.

1. The statute, (Comp. Stat. chap. 21, § 19, p. 244,) providing for the service of writs upon corporations, by leaving copies with any of their officers or stockholders in the absence of their clerks, has reference exclusively to corporations within this state. *Hall v. Vt. & Mass. R. Company*, 401.

2. The plaintiff's writ was dated April 22, 1855, and made returnable to the county court next to be held at, &c., "on the 4th Tuesday of June next," but was not served until the 19th of December, 1855, or entered on the docket of the county court until its January Term, 1856. *Held*, that the proceedings were irregular on their face, and should, on motion, be dismissed; and that an appearance of the defendant, for the purpose of having the process dismissed on account of such irregularity, was not a waiver of it. *Blodgett v. Brattleboro*, 696.

3. The alteration of the return day of a justice writ, so as to make it returnable at a later day than the one appointed at the time the writ was signed, will not extend the previous authorization of an indifferent person to serve the writ beyond the time within which it should have been originally served, if such alteration is made without the concurrence of the justice. *Carr v. Tyler*. 783.

PROMISSORY NOTES AND BILLS OF EXCHANGE.

1. It is no defense to an action on a promissory note that its consideration, in part, was a piece of land conveyed to the maker, by the payee, by a warranty deed; and that the land was incumbered by a mortgage which the grantee has since paid. *Hassams v. Dempier*, 82.

2. A note payable at a bank may be presented there for payment at any time during banking hours on the day of its maturity, and if not paid when so presented, it may be treated as dishonored; and a notice thereof, given immediately, and before the close of banking hours, on the same day, will charge the endorser. *Thorpe v. Pecks*, 127.

3. A notice of the dishonor of a bill of exchange, or promissory note, should be addressed to the endorser at the place of his residence, unless he is shown to have a place of private business elsewhere. The office of a corporation, of which he is an officer, (in this case the president,) in a town different from that in which he resides, will not, in the absence of proof, be regarded as his private business place; and a notice addressed to him there will not be sufficient. *Commercial Bank v. Strong*, 816.

4. That a notice to an endorser was seasonably deposited in the post office, need not be proved by a single witness. If more persons than one participated in the act, the testimony of all of them should be adduced. *Ib.*

5. Consideration of the probability as to the manner in which the notice in the present case was directed and sent to the defendant; and of the testimony, in reference to its legal sufficiency, to prove that the notice addressed to the defendant as endorser, was put into the post office, seasonably to charge him. *Ib.*

6. A promissory note, given upon an open account, when, and how far operating as a payment. *Dickinson v. King*, 878.

7. A note, given only as collateral, will not operate as a payment, though the creditor has negotiated and obtained the money; and a judgment in favor of the endorsee against the maker has been rendered upon it; if the judgment remains unsatisfied and the claim of the endorsee has been provided for, by the creditor, in some other way. *Ib.*

8. A person taking an overdue bill or note takes it subject to the equities, affecting the instrument itself, to which it is subject in the hands of the person from whom he receives it. *Bowen v. Thrall et als.*, 882.

9. A notice to the maker of a promissory note that it has been transferred, if sufficient to prevent his paying it to the original payee, will suffice to prevent him from being holden as the payee's trustee. *Downer v. Marsh's tr. & claimant*, 558.

10. Promissory notes held by one party against the other, would be included under the term "claims," in an agreement between them not to take advantage of the statute of limitations having run upon the other's claims. *Noyes v. Estate of Hall*, 645.

See ACCOUNT 1, 2, 8; ACTION 6, 7; AMENDMENT 1; ARBITRATION 12. ILLEGAL CONTRACT 1, 2, 3; PARTY 1; PROBATE COURT 1.

QUO WARRANTO.

1. *Quere*, whether, upon an information in the nature of a *quo warranto*, the prosecutor can, if objection is made, proceed merely by obtaining a rule to show cause, &c., or whether he should not follow the English practice, and proceed either by *venue facias* and *distringas*, or by subpoena and attachment. *State ex rel. Danforth et als. v. Hunton et als.*, 594.

See JUSTICE 5, 6; PRACTION 6.

RAILROAD.

1. When a railroad company have rightfully and properly turned a stream of water, they are not obliged thereafter to observe the action of the water and so protect the banks, or take other timely measures, as to prevent the encroachment of it upon neighboring lands. *Norris v. Vt. Central R. Co.*, 99.

2 Where a piece of land was deeded to a railroad company. it is to be presumed

that the contingent damages which would have been included in an assessment of the damages, by commissioners, upon a compulsory taking of it, were considered in determining the price which was paid for it. *BENNETT, J. 1b.*

8. The provision in the charter of the Vt. & Canada R. Co., requiring them to build and maintain fences on each side of their road, requires them to have such fences at least as soon as they commence running their road. *Clark v. Vt. & Canada R. Co., 108.*

4. In the construction of their road, the company were bound to exercise the rights conferred upon them with a prudent regard to the rights of others; and if they were guilty of negligence in this respect, whereby a landowner was injured, it is not to be presumed, in the absence of proof, that the damages thus occasioned were taken into consideration by the commissioners, in their subsequent appraisal of his land damages. The damages which they were to appraise, were those arising from the construction of the road properly and in a prudent manner. *1b.*

5. In an action against a railroad company, who are not made liable for consequential damages, occasioned by the construction of their road, to persons whose lands are not taken, evidence as to the manner in which they have constructed their road upon premises not belonging to the plaintiff, is inadmissible, if it does not tend to show that the company have exceeded their powers or have been negligent in the exercise of them. *Hatch v. Vt. Central R. Company, 142.*

6. A certified copy, from the records of a town, of what purports to be the location of a railroad in that town is admissible in evidence for the purpose of showing that such a paper was on record. *Ib.*

7. The decision in *Hatch v. Vt. Central R. Company, 25 Vt. 49*, recognized. *Ib.*

8. The provision in the 17th section of the act incorporating the Vermont Central Railroad Company, that its property and effects shall be exempt from taxes, limited, in its application to real estate, to such as the company were authorized to take by proceedings *in invitum*. *Vt. Central R. Co. v. Burlington, 198.*

9. Application of this limitation to the facts in the present case. *Ib.*

10. The plaintiffs having, under protest, paid to the collector of the defendants the taxes assessed upon their property which was exempt from taxation, can recover back of the defendants only such of the taxes as were collected for their benefit, and not the state, county and state school taxes, which the defendants had collected only as agents, and had paid over as directed by statute. *Ib.*

11. The lessee of a railroad is an agent of the railroad corporation, within the meaning of the general railroad act, (Comp. Stat. chap. 28, § 41,) making the corporation and its agents liable for damages occasioned by want of fences and cattle guards. *Clement v. Canfield, 302.*

See CRIMINAL LAW 3, 4, 5.

RAPE, See CRIMINAL LAW 1, 2.

REAL ESTATE.

1. The right of the owner of personal property to reclaim it, if he can identify it, does not exist when the property has been annexed to another person's freehold and become a part of the realty. *Jackson v. Walton, Tr., 43.*

2. A pew in a meeting-house is real estate. *Hodges & wife v. Green, 358.*

3. A promise to pay a specified price for real estate, conveyed or agreed to be conveyed to the promisor, need not be in writing. If the whole agreement for the conveyance of the real estate, and for the payment of its consideration, be by parol, and there is a conveyance, or a sufficient tender of a conveyance, according to that, part of the agreement, an action will lie upon the promise for the agreed price. *Ib.*

4. If the person to whom the real estate was to be conveyed, and who promises to pay for it, takes possession, and thereafter deprives the other party of all beneficial use or enjoyment of it, he cannot object to the time of the conveyance or of the tender of a conveyance of the legal title, if it was before the commencement of the suit, and he has sustained no injury from its not having been attended to sooner. *Ib.*

5. In a contract for the sale of real estate, a deed of which is executed and delivered, a promise by the purchaser to pay the consideration or furnish security for it, is not within the statute of frauds; and, if only by parol, an action may be maintained upon it. *Ascutney Bank et als. v. McK Ormsby*, 721.

See FIXTURES; PROBATE COURT 11.

ATTACHMENT OF, *See* ATTACHMENT 9, 10.

DESCENT OF, *See* WIDOW 5.

RECOGNIZANCE.

1. If a defendant, whose body is liable to be taken on execution, has, at the time of the rendition of a justice's judgment against him from which he appeals, property which would prevent him from taking the poor debtor's oath, so that the plaintiff might, by an imprisonment of the defendant's body, obtain payment of his debt, and, between that time and the rendition of a final judgment on the appeal, he so disposes of the property that he is then enabled to swear out, the plaintiff would be entitled to recover, in an action on the recognizance for the appeal, the damages thus sustained in being deprived of the opportunity of so collecting the debt, although the property which the defendant owned at the time of the appeal was without, and beyond the reach of the process of this state. *Richardson v. Hitchcock*, 757.

See EVIDENCE 19 to 22; REVIEW 2, 3, 4.

RECOUPMENT.

1. In an action to recover for trust property attached and sold upon process against the trustee personally, it cannot be shown that a part of the demand, for the recovery of which the process issued, was for property bought by the trustee for the benefit of the trust, and appropriated to the use of the *cestui que trusts*, and the value of it be deducted in the recovery by way of *recoupment*, or otherwise, if it do not appear and is not claimed that there was any mistake, misrepresentation or other fraud in obtaining it on the personal credit of the trustee. *Barber v. Chapin*, 418.

2. Instances in which the term *recoupment* is properly applicable to the reduction of damages by way of a *quasi* offset of a counter unliquidated claim. *Ib.*

RES GESTÆ, *See* EVIDENCE 12.

REVIEW.

1. A petition for partition is not a civil cause within the meaning of the statute allowing reviews. Comp. Stat. chap. 28, § 17, (but repealed by No. 51 of the laws of 1855.) *Nichols et al. v. Nichols et al.*, 228.

2. In an action on a recognizance for a review, if there was a breach of it, and the debt is paid after the commencement of the suit, but without the costs of it, the plaintiff will be entitled to a judgment for nominal damages and costs. *Brown v. Clark*, 690.

3. The condition of a recognizance for a review is not broken if no intervening damages are sustained, and no additional costs recovered by the reviewee. *Id.*

4. Where, in action on a recognizance for a review, it only appears that, subsequent to the review, the reviewee obtained a judgment for a given sum in damages, and a given sum for costs, the supreme court cannot take judicial notice that any of the costs so recovered were for costs which accrued after the review. *Id.*

5. The plaintiff, in action of ejectment against two defendants, recovered a verdict at the first trial against one only of them, who entered a review, and the plaintiff at the same time entered a review as to the other defendant. At the second trial a verdict was rendered in favor of both of the defendants. Held, that the plaintiff was not then entitled to review the action as to the defendant against whom he obtained a verdict at the first trial. *Frost v. Philbrook et al.*, 786.

REVOCATION.

1. The revocation of a submission is a breach of an agreement or condition in an arbitration bond to abide by and perform the award. *Craftsbury v. Hill et al.*, 768.

2. The bringing of an action on book account is not, *per se*, a revocation of an authority previously given by the plaintiff to the defendant to pay a third person certain items in the plaintiff's account. If the defendant, after the commencement of the suit but before the audit, pay such items to a third person in pursuance of an authority previously given, and not revoked, he should be allowed for such payment, although he thereby obtains a balance of the accounts in his favor. *Walker v. Barrington*, 781.

See GUARANTY 12.

SALE.

1. A person contracting to purchase a good article will, if he accept one which is depreciated, with knowledge of its condition, but without objecting to it on that account, be holden to pay the price originally stipulated. *Cram v. Watson*, 22.

2. The rule recognized and laid down in *Hutchins v. Gilchrist*, (23 Vt. 81,) in reference to the possession and change of possession of logs, upon the land of a third person, applied to the facts in the present case. *Birge et al. v. Edgerton*, 291.

3. The defendant bought of W. a bay of hay in a barn on a farm which W. occupied and carried on by his hired man, and removed a part of it, and requested W.'s hired man to take care of the remainder for him, which the hired man, with the knowledge of W., agreed to do. The rest of the barn was occupied with other hay and property of W. Held, that there was not a sufficient change of possession of that part of the bay of hay that remained to protect it from attachment by W.'s creditors. *Sleeper v. Pollard*, 709.

4. One who purchases goods for his own benefit is liable for them, though he purchase them upon the credit of another, with his consent, and without disclosing his own interest in them. *Coverly & Co. v. Braynard & Tr.*, 738.

See ACTION 9, 11; ATTACHMENT 1 to 5; GUARANTY 7.

SCHOOL DISTRICT.

1. The plaintiff built a school house for the defendants, under the employment, upon a *quantum meruit*, of one member only of their building committee, who, it was claimed, could not act without the concurrence of his associates, and that the committee could not bind the district to an amount exceeding \$100.00. The school house was worth \$200.00; and, after its completion, the defendants voted to accept it, and voted to pay the plaintiff \$105.00 therefor, *Held*, that the acceptance was absolute, and amounted to a ratification of the proceedings of the committeeman, and bound the defendants to pay the plaintiff what the school house was worth. *Kimball v. School District*, 8.

SCHOOL TEACHER.

1. The plaintiff contracted to teach school for the defendants, and on the morning of the day he commenced, and before commencing his school, he applied to the superintendent for examination and a certificate; but the examination was, at the request of the superintendent, and upon his assurance that it would be as well, postponed until evening, at which time, after the commencement of the school, an examination was had and a certificate given; and after this the school proceeded for about seven weeks without objection and without any new contract being made. *Held*, that there was a substantial compliance with the statute requiring a certificate to be obtained before the commencement of the school, and that, in any view of the case, the certificate would be sufficient for the school kept after, if not for the same day that it was given. *Paul v. School District*, 575.

2. The fact that scholars and parents are dissatisfied with a school teacher is no sufficient cause for dismissing him before the expiration of the time for which he has been employed. Evidence to show such dissatisfaction is, therefore, inadmissible in an action to recover damages on account of such a dismissal. To justify it actual incapacity or unfaithfulness must be shown. *Ib.*

SCIRE FACIAS.

1. A writ of *scire facias*, alleging only the rendition of the judgment, and that execution yet remains to be done, may properly be amended by adding averments showing that the apparent satisfaction of an execution already issued, was by a levy upon, and sale of property which was subsequently claimed and held by a third person. *Baxter v. Shaw*, 569.

2. The levy of an execution upon property of the debtor, upon which there was a prior lien by attachment, in favor of a third person, which was unknown to the creditor, to the satisfaction of which the property was subsequently appropriated, is a levy upon property "which did not belong to the debtor," within the meaning of the statute, (Comp. Stat. 815, § 46,) giving to the creditor a new execution in such a case. The statute extends to cases where the debtor, though having the general ownership, yet has no such title to the property, as can be made available to the levying creditor. *Ib.*

3. The declaration in the present case held defective, on demurrer, in not alleging a continuance and perfection of the prior attachment lien, by a reasonable issuing of the execution, and charging of the property. *Ib.*

See PLEADING 4.

SECURITY, *See* ACCOUNT 2; ACTION 6, 9, 10, 11.

SHIPPING RECEIPT, *See* BILLS OF LADING.

STATUTE OF FRAUDS, *See* FRAUDS, (STATUTE OF.)

 STATUTE OF USES, *See* USES, (STATUTE OF.)
SUB CONTRACTOR, *See* MASTER AND SERVANT 3, 4, 5, 6.

SUBSTITUTION.

1. A person who is substituted in place of a mortgagee may, if equity requires it, be limited, and have allowed to him a less extensive right than that to which the mortgagee himself would have been entitled. *Bailey v. Warners*, 87.

2. A mortgagee cannot be compelled to rely upon a part only of the mortgaged premises, though that part may be adequate security for his claim, but one substituted in his place may be, if equity requires it. *Ib.*

SURETY, *See* GUARANTY 11; PRINCIPAL AND SURETY.

TAXES.

1. Property bequeathed to, and held by a trustee, the interest or income of which is to be paid to a person during life, and after her decease the principal to be paid to the testator's heirs at law, is assessable (under Comp. Stat. Chap. 80, §15,) to the person entitled to the income. *Webb v. Burlington*, 188.

2. A person residing here, who owns, or is interested in the stocks of other states, may be legally assessed therefor in this state. *Ib.*

3. The provision in the 17th section of the act incorporating the Vermont Central Railroad Company, that its property and effects shall be exempt from taxes, limited, in its application to real estate, to such as the company were authorized to take by proceedings *in invitum*. *Vi. Central R. Company v. Burlington*, 188.

4. The plaintiff's having, under protest, paid to the collector of the defendants the taxes assessed upon their property which was exempt from taxation, can recover back of the defendants only such of the taxes as were collected for their benefit, and not the state, county and state school taxes, which the defendants had collected only as agents, and had paid over as directed by statute. *Ib.*

5. The plaintiff claimed to recover the amount of certain taxes, which he claimed had been assessed against the defendant and placed for collection in the hands of the plaintiff, as constable, and by him paid to the town, to which he was accountable, and that the defendant had promised to pay him. *Held*, that the tax-bills in the hands of the plaintiff were admissible, and *prima facie* evidence of the existence of the taxes, and the amount for which the defendant was liable upon them. *Bowman v. Downer*, 532.

6. *Held*, also, that the fact that the plaintiff had given bonds, as constable, and received the tax-bills in question, and had settled with the town and taken up his bonds, afforded *prima facie* evidence that he had paid the taxes assessed against the defendant. *Ib.*

7. A request from the defendant to the plaintiff so to pay, may be inferred from an assurance given by the defendant, upon receiving a note from the plaintiff, that it could be arranged by the taxes the defendant was owing him, and that within the year for which the note was given they would get together and have it settled. The defendant had subsequently transferred the note, and the plaintiff had been obliged to pay it to the endorsee. *Ib.*

8. The plaintiff, a constable, had for collection several taxes against the intestate, between whom and the plaintiff there were running and mutual accounts, and it was understood that these taxes should be settled for as a matter of deal and account between them in the settlement of their other accounts; and the plaintiff paid over the

amount of the taxes without collecting them. *Held* that he might recover the amount so paid in an action on book account. *Noyes v. Estate of Hall*, 645.

9. A warrant for the collection of highway taxes is insufficient, if, in the event of the neglect of any of the persons assessed to pay their taxes, the only command to the collector be "to proceed with him or them as the law directs." *Flint v. Whitney*, 680.

10. To make the collector of a tax liable in trespass merely for taking the body instead of the property of a delinquent tax-payer, there must be a distinct offer to him of some specific property. A general request to take property and proof that the person assessed had property will not suffice. *Ib.*

11. The omission of a tax collector, who commits a delinquent to jail on account of the non-payment of his tax, to certify his doings on the copy of his warrant left with the jailor cannot be supplied by parol proof of his proceedings. The original warrant not being a returnable process, a certificate of the collector thereon is not so far in the nature of a return as to be conclusive upon the parties. *Ib.*

TENANCY and TENANT, *See* LANDLORD AND TENANT.

TOWN.

1. The due organization of a town, previous to a particular time, may be presumed from the fact that at that time they had appointed town officers, and were exercising the rights and powers belonging to organized towns. *Londonderry v. Andover* 416.

TOWN ORDER, *See* HIGHWAY 6. 7.

TRESPASS.

1. The plaintiff claimed title to a piece of land upon which a quantity of wood had been cut by a person claiming adversely to her, by whose employment the defendant removed the wood about one hundred rods from the place where it was cut, but left it on the same lot. *Held*, that if the wood belonged to the plaintiff, so that she could maintain an action of trespass against the defendant for the removal, she could recover only nominal damage, or such actual damages as were occasioned by the removal. *Pratt v. Battels*, 635.

2. The defendant, for the purpose of widening a side-hill highway upon the plaintiff's land, drew stone and dumped them on the lower side of the road so that some of them rolled down against and through the plaintiff's fence into his field. The widening of the road was necessary, and was done in a proper and reasonable manner, with the approval of the highway surveyor. *Held*, that the defendant was not liable to the plaintiff in an action of trespass for so doing. *Morse v. Weymouth*, 824.

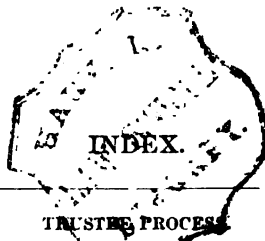
See LANDLORD AND TENANT 1, 2, 8; TAXES 10.

TRUST, *See* HUSBAND AND WIFE 3, 4, 5; COSTS 4.

TRUST PROPERTY.

1. In an action to recover for trust property attached and sold upon process against the trustee personally, it cannot be shown that a part of the demand, for the recovery of which the process issued, was for property bought by the trustee for the benefit of the trust, and appropriated to the use of the *cestui que trust*, and the value of it be deducted in the recovery by way of *recoupment*, or otherwise, if it do not appear and is not claimed that there was any mistake, misrepresentation or other fraud in obtaining it on the personal credit of the trustee. *Barber v. Chapin*, 413,

See TAXES 1.



TRUSTEE PROCESS

1. The principal defendant quarried, dressed, sold and delivered to the trustee a quantity of granite and laid it down for a permanent walk on the trustee's premises. He obtained the stone without right from the quarry of a third person, who, after the walk was laid, claimed them as his property. *Held*, that the property of the stone was in the trustee after they were laid into a walk, and that the trustee was indebted to the principal defendant and liable as his trustee, at least for the increased value of the stone which was produced by their being quarried, dressed and delivered. *Jackson v. Walton, Tr.*, 43.

2. If an assignment is void under our statute on account of its being a general assignment in trust for the benefit of creditors, the assignee should be allowed the amount of the assignor's indebtedness to him, and the expenses to which he has been subjected in taking care of and selling the property, and a reasonable compensation for his services, before being made liable as the trustee of the assignor. *Bishop et al v. Tr. of Harts*, 71.

3. If the creditor of the assignor in such an assignment, instead of directly attaching the property, seeks to charge the assignee as the assignor's trustee, he thereby ratifies the assignment, and any disposition of the property which the assignee has made in pursuance of it. *Ib.*

4. Under such an assignment the assignee should not be adjudged the trustee of the assignor, on account of any money received by him on the sale of real estate, which was included in the assignment, the title of which may be defeated by an attachment of it by other creditors of the assignor. *Ib.*

5. Upon exceptions to a decision of the county court in reference to the liability of a person summoned as a trustee, by which his disclosure is made a part of the case, and no evidence appears to have been introduced in contradiction of it, the statements contained in the disclosure will be regarded as facts found by the county court. *Merrill et als. v. Englesby Tr.*, 150.

6. Under the provision of the statute allowing the trustee to retain or deduct his demands against the principal defendant from the effects in his hands, he may retain whatever, before the service of the trustee process, he becomes legally bound to pay to any third party on account of the principal defendant. *Ib.*

7. A confession of judgment before a justice of the peace, in pursuance of section 4 of chap. 115, Comp. Stat., operates as a merger of the original cause of action;— and the suit could not, before the act of 1855, (Laws of 1855. p. 13,) thereafter proceed against persons summoned as trustees, even though it was expressly understood that the plaintiff should not be thereby prejudiced in pursuing the trustees. *Barnes v. Lapham & Tr.*, 307.

8. A notice to the maker of a promissory note that it has been transferred, if sufficient to prevent his paying it to the original payee, will suffice to prevent his being holden as the payee's trustee. *Downer v. Marsh's Tr. & Claimant*, 559.

9. A claimant of the effects in the hands of a person summoned as trustee in a suit before a justice can only appeal, if at all, in such cases as are appealable by the other parties. If, therefore, the action be upon a note for less than \$20, and the indebtedness of the trustee be upon a similar note, the claimant cannot appeal from a decision and judgment adverse to his claim. *Cabot v. Burnham's Trustee & Claimant*, 694.

10. The plaintiff in a trustee suit before a justice, the subject-matter of which is appealable, may appeal from the judgment of the justice in reference to the liability

of the trustee, where the principal defendant is defaulted. *Van Buskirk v. Martin & Tr.*, 726.

11. Where the persons summoned as trustees are summoned only as partners, the effects or credits in the hands of one of them individually are not attached, and can not be holden. *Coverly & Co. v. Braynard & Tr.*, 738.

12. If a person summoned as trustee is not, when summoned, indebted to the principal defendant in a sum exceeding ten dollars, and does not subsequently, before making his disclosure, become indebted to him to that amount, he cannot be charged as trustee, though there may have been, during that time, mutual dealings between them, upon which the indebtedness of the trustee would have exceeded ten dollars if he had made no payments after being summoned. *Carr v. Fairbanks & Co.*, Tr., 806.

See ASSIGNMENT 10, 11.

UNDERGROUND WATER, See WATER AND WATER-COURSE 1.

USES, (STATUTE OF.)

1. A covenant to stand seized to the use of a third person, which would be executed under the statute of Henry VIII., were that statute in force here, will be enforced by a court of equity. *Sherman, Admr. v. Est. of Dodge*, 28.

USURY.

1. The defendant borrowed of the oratrix, through her general agent, a sum of money for which he gave his note; and on the same occasion, but without the personal knowledge of the oratrix, he purchased a span of horses belonging to the agent for \$400.00, and gave his note to the agent for that sum and subsequently paid it. The horses were not worth over \$225.00. The defendant made the purchase and agreed to give \$175.00 more than the horses were worth for the purpose of procuring the loan. Held, that the \$175.00 thus received by the agent was usury, and should be deducted in ascertaining the amount due on the oratrix's note. *Austin v. Harrington*, 180.

WATER AND WATER-COURSE.

1. There are no correlative rights existing between the proprietors of adjoining lands in reference to the use of water in the earth, or percolating under its surface. Such water is to be regarded as part of the land itself, to be enjoyed absolutely by the proprietor within whose territory it is; and to it the law governing the use of running streams is inapplicable. *Chatfield v. Wilson*, 49.

2. Uses to which the water of running streams may be applied; and considerations determining the extent and manner of such use. *Snice v. Parsons*, 459.

3. The reasonableness of the use of a stream of water in a particular manner, or for a particular purpose, and the extent to which a proprietor below must submit or accommodate himself to the inconveniences arising therefrom, when it is, in its nature, doubtful, is a question of fact. And in determining it, testimony showing the uniform custom of the country in reference to it is admissible. *Id.*

See BOUNDARY 3; RAILROAD 1.

WEARING APPAREL.

1. Neither the watch, or its chain, key and seals, or the finger-ring which were usually worn by a person when living, are to be deemed a part of his wearing apparel which, after his decease are, by § 1 of chapter 50 of the Compiled Statutes, to go his widow. *REDFIELD, CH. J., dissenting.* Otherwise of a bosom-pin. *Sawyer v. Heirs of Sawyer*, 249.

2. Nor are the sword and sword-belt which an officer of the United States' navy wore, in accordance with the regulations of the navy department, to be regarded as a part of his wearing apparel, within the meaning of the above statute; *RYDFIELD, CH. J., dissenting.* But his epaulets are. *Ib.*

WIDOW.

1. The statutory provision for the maintenance of the widow of a deceased person during the settlement of his estate, has a general application; and the probate court have a discretion only as to the amount of the allowance, and cannot refuse it altogether where the widow has other abundant means of maintenance. *Heirs of Sawyer v. Sawyer, 245.*

2. A widow is entitled to an allowance for such maintenance, though there be no children. *Ib.*

3. The statute does not require such allowance to be made in advance of the expenditure. *Ib.*

4. The amount of the allowance is a matter resting in the discretion of the probate court, or of the county court upon an appeal; and is not ordinarily subject to revision upon exceptions, in the supreme court. *Ib.*

5. The widow of a person who left no issue is, if his real estate exceeds \$1,000, entitled to that sum, and to one half of the residue forever; and she takes this by descent. She is also entitled to one half of the personal property which is left for distribution. *Sawyer v. Heirs of Sawyer, 249.*

6. To entitle her to this distribution, it is not necessary that she should avail herself of the provisions of §6 of chapter 54 of the Compiled Statutes; nor is her right, in this respect, affected by the first provision in §1 of chapter 50 of the Comp. Stat., when she claims no assignment under it. *Ib.*

See WEARING APPAREL.

WILL.

1. If a testator, in a codicil to his will, make a disposition of a portion of his property, which is inconsistent with the disposition which he had previously made of it, in the original will, it will operate *pro tanto* as a revocation of the original provision. *Estr. of Larrabee v. Larrabee, 274.*

2. Application of this principle, &c. *Ib.*

3. A bequest to C. L., in case he outlived L. L., to whom the use of it, during her life, had previously been given, of "such part of the personal estate as may then remain," which was made in a codicil, construed as conveying all the personal estate that remained after the decease of L. L., without regard to the disposition which had been made of it in the original will; and as not limited to such personal property as remained otherwise undisposed of by the original will. *Ib.*

WITNESS.

2. The witness law of 1852 (Laws of 1852, p. 11,) contemplated the examination of a party as a witness only in open court, and did not authorize the using of his deposition. *Admr. of Sheldon v. Griswold, 376.* (But see Laws of 1855, p. 12.)

3. A party is not obliged, as a witness, to disclose any consultation he may have had with his counsel in relation to the cause. He is equally protected, with his counsel, from testifying respecting confidential communications between them. *Hemenway v. Smith et al., 701.*

See CRIMINAL LAW §, 2.

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